(2) The Circuit Court of Appeals erred in not reversing the said judgment.

(3) The District Court of the United States for the Eastern District of Virginia erred in refusing to direct the jury to find a verdict for the defendant in said cause and the Circuit Court of Appeals erred in affirming the action of the District Court in this regard.

(4) The District Court of the United States for the Eastern District of Virginia erred in giving the following instructions to the jury in its charge:

> "If the jury believe from the evidence that it was necessary or usual, within the knowledge of the yardmaster Taylor, for the plaintiff, when attempting in obedience to the order of the said yardmaster in the night time to couple or connect the air-hose upon two cars of the train of the defendant, to place himself in part between said cars, so that he would be unable to see or ascertain the approach of the other car or cars of said train, which were being moved, in order that they might be attached to one of the said two cars, then it was the duty of the said defendant by and through its said yardmaster to exercise reasonable and ordinary care to prevent, without due notice being given to the plaintiff, the said cars, so to be attached, from being driven or moved at an unusual and excessive speed and with great and unusual violence against one of the said cars upon which the plaintiff was doing the coupling as aforesaid, so as to cause the last mentioned car to strike the plaintiff while so at work, to knock or shove him down and run over him, and if the said yardmaster did not exercise such reasonable and ordinary care, and his failure so to do was the proximate cause of the accident, then they must find for the plaintiff."

This instruction was objectionable for the following reasons:

1. The defendant did not owe the plaintiff any such duties as are set out in the instruction. 2. Neither the defendant nor its yardmaster, Taylor, nor any of its agents or servants, were guilty of any negligence upon which to predicate such an instruction. 3. There was no allegation in the declaration or evidence in the case upon which to base an instruction, as a whole, or the elemental parts thereof. 4. Under the evidence in the case the plaintiff assumed the risk of the injury he received. 5. There could be no recovery by the plaintiff for any injury occasioned by the method of doing the work. 6. And the instruction was otherwise irrelevant and improper.

(5) The Circuit Court of Appeals erred in affirming the action of the District Court in this regard.

(6) The District Court of the United States for the Eastern District of Virginia erred in giving the following instruction to the jury in its charge:

> "If the jury believe from the evidence that the plaintiff, while at work upon certain cars of the defendant under the order of the yardmaster, was injured by reason of other of its cars being driven or moved through the negligence of any of its employees, managing or at work on the last mentioned cars, without any notice or warning to the plaintiff and with improper and unusual force or speed against the car upon which the plaintiff was at work, that is such negligence on the part of the defendant as will make it liable to the plaintiff if such negligence was the proximate cause of the accident."

This instruction was objectionable on the following grounds:

1. The defendant did not owe the plaintiff any such duties as are set out in the instruction. 2. Neither the defendant nor any of its agents or employees were guilty of any negligence as in said instruction alleged. 3. There was no allegation in the declaration or evidence in the case upon which to base such an instruction. 4. Under the evidence in the case the plaintiff assumed the risk of the injury he received. 5. There could be no recovery by the plaintiff for any injury occasioned by the method of doing the work. 6. The instruction is otherwise irrelevant and improper.

(7) The Circuit Court of Appeals erred in affirming the action of the District Court in this regard.

(8) The District Court of the United States for the Eastern District of Virginia erred in giving the following instruction to the jury in its charge:

> "The jury is instructed that, if they find in favor of the plaintiff, their duty is—
>
> 1st. To determine what is a fair and just sum to compensate the plaintiff for any physical suffering arising from said injury, and any physical pain he will suffer in the future, any loss to which he has been subjected in the past by reason of being unable to follow his calling or to work, and any loss which he may reasonably be expected to suffer by reason of his being incapacitated from following said calling or of doing any other work he would have done had he not been injured; but in no event to exceed the amount laid in the declaration, being $20,000.
>
> 2nd. Whether the plaintiff was guilty of contributory negligence. If he was not then you may find for him such sum so ascertained, as above stated.
>
> 3rd. If you find that he was guilty of contributory negligence that will not prevent his recovery, but must be considered by the jury in diminution

> of the sum so ascertained in the proportion his negligence compared with the combined negligence of himself and the defendant."

This instruction was objectionable on the following grounds:

The instruction allowed the plaintiff to recover for "any physical suffering arising from said injury, and any physical pain he will suffer in the future, any loss to which he has been subjected in the past by reason of being unable to follow his calling or to work, and any loss which he may reasonably be expected to suffer by reason of his being incapacitated from following said calling or of doing any other work he would have done had he not been injured; but in no event to exceed the amount laid in the declaration, being $20,000," all of which was irrelevant and improper as the elements of damage, allowed to be recovered thereunder, were not recoverable in this action, nor were any or either of them; and it was otherwise irrelevant and improper.

(9) The Circuit Court of Appeals erred in affirming the action of the District Court in this regard.

(10) The District Court of the United States for the Eastern District of Virginia erred in refusing to give in its charge the following instruction asked for by the defendant:

> "The court instructs the jury that even tho' they believe from the evidence that in shifting the cars into the cut of cars among which the plaintiff was injured while coupling the air-hose of two of the cars and that the impact was greater and more violent than usual still they cannot find a verdict for the plaintiff on that account alone."

(11) The Circuit Court of Appeals erred in affirming action of the District Court in this regard.

(12) The District Court of the United States for the Eastern District of Virginia erred in refusing to give in its charge the following instruction asked for by the defendant:

> "The court instructs the jury that they cannot base a verdict upon conjecture, guess or random judgment and unless they believe from a preponderance of the evidence that the plaintiff would not have been injured, but for the violence of the impact, they must find for the defendant, even tho' they may believe from the evidence that the impact caused by coupling the cars was unusually violent."

(13) The Circuit Court of Appeals erred in affirming the action of the District Court in this regard.

(14) The District Court of the United States for the Eastern District of Virginia erred in refusing to give in its charge the following instruction asked for by the defendant:

> "The court instructs the jury that if they believe from the evidence that the injury to the plaintiff was the result of an unforeseen accident then the defendant company is not responsible therefor."

(15) The Circuit Court of Appeals erred in affirming the action of the District Court in this regard.

(16) The District Court of the United States for the Eastern District of Virginia erred in refusing to give the following instruction in its charge which instruction was asked for by the defendant:

"The court instructs the jury that if they believe from the evidence that the method adopted by the defendant in making up the train at Gladstone was the usual and ordinary method of doing this work then they are instructed the plaintiff assumed all the risks incident to the said method of doing the work and they cannot find a verdict for the plaintiff because of any injury received on account of said method of doing the work even tho' they believe from the evidence that the said method was the direct and proximate cause of the injury to the plaintiff."

And in modifying the said instruction and giving the same as modified as follows:

"The court instructs the jury that the defendant company has the right to adopt reasonable rules and regulations for the conduct and method of handling its train of cars on its yards, and of making up its trains for their departure therefrom, and if they believed from the evidence that the custom prevailed in the Gladstone yard at the time of the accident on which the occurrence happened of making up the train from both ends at the same time, that is, by working the train engine and crew at the forward end, and the yard engine and its crew at the rear end, and that such method was one that reasonably prudent and careful men would have adopted in the conduct of its business, then they are instructed that the plaintiff assumed the risks reasonably and usually incident to and arising from such method of making up trains; and they cannot find a verdict for the plaintiff because of any injury received solely on account of said method of making up the train; although they may believe

> from the evidence that the method adopted was the direct and proximate cause of the injury to the plaintiff."

This instruction as modified and given by the court allowed the jury to pass upon the question as to whether the method of doing the work in the performance of which the plaintiff was injured was negligent, and then, if the jury believed the method of doing the work was a negligent one, the instruction allowed a recovery by the plaintiff even though the dangers from said method were open, obvious and known to the plaintiff and he continued in the employment without objecting and even though the said method itself was the direct and proximate cause of the injuries he received.

(17) The Circuit Court of Appeals erred in affirming the action of the District Court in this regard.

(18) The District Court of the United States for the Eastern District of Virginia erred in refusing to give the following instruction in its charge, which instruction was asked for by the defendant:

> "The court instructs the jury that before they can find a verdict for the plaintiff, the plaintiff must not only show by the evidence, that the defendant was negligent, but that such negligence, if it existed, was the proximate cause of the injury to the plaintiff; therefore they are instructed that even tho' they may believe from the evidence that the cars were shifted in and coupled to a cut of cars among which the plaintiff was injured while coupling the air-hose of two of the cars and that the impact was unusually violent, still in the absence of affirmative preponderating evidence that said unusual violent impact was the proximate cause of

> the injury to the plaintiff, they must find for the defendant."

And in modifying the said instruction and giving the same as modified as follows:

> "The court instructs the jury that in order for the plaintiff to recover, he must establish the negligence of the defendant by a preponderance of the evidence, and that such negligence of the defendant was the proximate cause of the injury to him; and they are further instructed that although they believe that the cars that were being shifted in and coupled to a cut of cars on which the plaintiff was injured while coupling the air-hose of two cars, were being moved and operated with unusual speed and force, still the mere fact that the cars were being shifted in an unusual and violent manner will not entitle the plaintiff to recover on that account, unless they believe that it was the proximate cause of the accident."

This instruction as modified, did not state to the jury that there could be no recovery by the plaintiff "in the absence of affirmative preponderating evidence that said unusual violent impact was the proximate cause of the injury to the plaintiff" and further allowed the plaintiff to recover for injuries received on account of the violent impact of the cars alone. The instruction as asked for was a correct exposition of the law as applied to the evidence in the case.

(19) The Circuit Court of Appeals erred in affirming the action of the District Court in this regard.

III.

ARGUMENT.

It will not be attempted, in the discussion of these assignments of error, to follow them *seriatim.*

It will be observed that a large number of them are as to instructions given and refused, and in these specifications it was necessary to set out *in totidem verbis* the parts of these instructions which were referred to. Rule 21, par. 2.

In the discussion that is to follow we will endeavor to show the general principles of law governing the case, and will point out from time to time how there was error committed in the application thereof.

QUESTIONS INVOLVED.

The assignments of error present questions which will be discussed under the following heads:

1. Under the common law doctrine of "assumed risks," as construed and applied in the Federal courts, the servant assumes the risks arising from the master's method of doing the work where the dangers or defects are open, obvious or known to the servant and he continues in the employment of the master, even though such risks may have been originally due to the master's negligence.

2. The doctrine of "assumed risks" as applicable to common carriers, has not been changed by the Employers' Liability Act except in the one case "where the violation by such common carrier of any statute enacted for the safety of employes contributed to the injury or death" of an employee.

3. The method of conducting the business in this case, that is, of shifting and coupling at both ends of the train, without any notice and warning to those working at the

other end of the train, was open, obvious and known to the plaintiff and he, therefore, assumed the risk of any injury arising from that source.

4. Instruction "B" on the subject of the assumption of risks, as asked for by the defendant, should have been given and the modification by the court was improper and should not have been given, since it was violative of the doctrine of assumed risks.

5. The alleged negligent method of doing the business is the foundation of the case at bar whereas it was no ground of liability.

6. There could be no recovery in this case for an injury to the plaintiff occasioned by the alleged violence of the impact caused by the cars coupled from the rear of the train, even if it were the proximate cause of the injury.

7. There was no evidence in the case showing or tending to show that the violence of the impact caused by the cars coupled from the rear of the train was the proximate cause of the injury to the plaintiff.

8. The instruction given by the court on the measure of damages, as asked for by the plaintiff, was erroneous on the question of the allowance of compensation (a) for "any physical pain" the plaintiff "will suffer in the future" and (b) for being unable to follow his calling or to do "any other work he would have done had he not been injured."

(1)

Under the common law doctrine of "assumed risks," as construed and applied in the Federal courts, the servant assumes the risks arising from the master's method of doing the work where the dangers or defects are open and obvious or known to the servant and he continues in the employment of the master, even though such risks may have been originally due to the master's negligence.

In 1 Labatt on Master and Servant, at sec. 274, it is said:

> "The doctrine that a servant who has no knowledge, actual or constructive of an extraordinary risk, is not chargeable with its assumption, is applied in every jurisdiction in which the principles of the common law are recognized. The logical converse of this doctrine, viz., that a servant is to be regarded as having assumed any extraordinary risk of which he had or ought to have obtained knowledge, before his injury is received, was also applied universally until comparatively recent times and it is still the prevailing rule of law in the United States. The effect of the operation of this doctrine with reference to a servant's inability to maintain an action may be formally stated thus: A servant who, either before or after he commences the performance of the contract of employment has ascertained or ought, in the exercise of proper care, to have ascertained, that the ordinary hazards of his environment have been augmented by abnormal conditions produced by the negligence of his master's representative, and has accepted or continued in the employment without making any objections and without receiving any promise that the abnormal conditions will be remedied, is deemed, as a matter of law, to have assumed the risk thus superadded, and to have waived any right which he might otherwise have had to claim an indemnity for injuries resulting from the existence of that risk."

The doctrine applies equally to a "faulty system of work" as to a defective instrumentality. *Idem*, sec. 278.

This doctrine has received the repeated sanction of the Supreme Court of the United States.

In *Butler* v. *Frazee*, 211 U. S., p. 466, 467, 53 L. ed. 285, Mr. Justice Moody said:

> "Where the elements and combination out of which the danger arises are visible it cannot always be said that the danger itself is so apparent that the employee must be held, as matter of law, to understand, appreciate, and assume the risk of it. *Texas & P. R. Co.* v. *Swearingen*, 196 U. S. 51, 49 L. ed. 382, 25 Sup. Ct. Rep. 164; *Fitzgerald* v. *Connecticut River Paper Co.*, 155 Mass. 155, 31 Am. St. Rep. 537, 29 N. E. 464. The visible conditions may have been of recent origin, and the danger arising from them may have been obscure. In such cases, and perhaps others that could be stated, the question of the assumption of the risk is plainly for the jury. But where (467) the conditions are constant and of long standing, and the danger is one that is suggested by the common knowledge which all possess, and both the conditions and the dangers are obvious to the common understanding, and the employee is of full age, intelligence and adequate experience, and all these elements of the problem appear without contradiction, from the plaintiff's own evidence, the question becomes one of law for the decision of the court. Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the judge presiding at the trial to instruct the jury accordingly. *Patton* v. *Texas & P. R. Co.*, 179 U. S. 658, 45 L. ed. 361, 21 Sup. Ct. Rep. 275, and cases there cited."

In the case of *Schlemmer* v. *Buffalo, &c. Ry. Co.*, 220 U. S. 596, 55 L. ed. 596, 600, Mr. Justice Day, speaking for the court, said:

> "In the absence of statute taking away the defense, or such obvious dangers that no ordinarily prudent person would incur them, an employee is held to assume the risk of the ordinary dangers of the occupation into which he is about to enter, and also those risks and dangers which are known, or are so plainly observable that the employee may be presumed to know of them, and if he continues in the master's employ without objection, he takes upon himself the risk of injury from such defects. *Choctaw, Oklahoma, &c. R. R. Co.* v. *McDade,* 191 U. S. 64, 67, 68, and former cases in this court there in cited."

In the case of *Choctaw R. R. Co.* v. *McDade,* 191 U. S. 68, 48 L. ed. 96, the court, after stating the general rule that the servant does not assume the risks of dangers due to the master's negligence, states exception to the rule as follows:

> "This rule is subject to the exception that where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the defective apparatus in the face of knowledge and without objection, without assuming the hazard incident to such a situation. In other words, if he knows of a defect, or it is so plainly observable that he may be presumed to know of it, and continues in the master's employ without objection, he is taken to have made his election to continue in the employ of the master, notwithstanding the defect, and in such case cannot recover. The charge of the court upon the assumption of risk was more favorable to the plaintiff in error than the law required, as it exonerated the railroad company from fault if, in the exercise of ordinary care,

McDade might have discovered the danger. Upon this question the true test is not in the exercise of care to discover dangers but whether the defect is known or plainly observable by the employee. *Texas & Pacific Ry. Co.* v. *Archibald*, 170 U. S. 665."

In *Texas & Pacific Ry. Co.* v. *Harvey*, 228 U. S. 519, 57 L. ed. 852, the court said:

"At the common law the servant assumed the ordinary risks of his employment, but he is not obliged to pass upon the methods chosen by his employer in discharging the latter's duty to provide suitable appliances and a safe place to work, and he does not assume the risk of the employer's negligence in performing such duty. *This rule is subject to the exception that, where a defect is known to the employee or is so patent as to be readily observed by him, he cannot continue to use the defective appliance, in the face of knowledge and without objection, without himself assuming the hazard incident to such a situation. If a defect is so plainly observable that the servant may be presumed to know its existence, and he continues in the master's employment without objection, he is said to have made his election to thus continue, notwithstanding the master's neglect, and in such a case he cannot recover. Choctaw, O. & G. R. Co.* v. *McDade*, 191 U. S. 64, 48 L. ed. 96, 24 Sup. Ct. Rep. 24; *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 220 U. S. 590, 596, 55 L. ed. 596, 600, 31 Sup. Ct. Rep. 561." (Italics ours.)

See, also, *Randall* v. *B. & O. R. R. Co.*, 109 U. S. 478; *Tuttle* v. *Milwaukee Ry.*, 122 U. S. 195.

One of the latest decisions on the general question is the case of *Gila Valley* v. *Hall*, 232 U. S. 93, 58 L. ed. 521.

See, also, *S. A. L. R. Co.* v. *Horton*, 233 U. S. 492, 58 L. ed. 1062, presently to be discussed.

Were it not for the fact that this principle was denied in the District Court in its modification of instruction "B," asked for by the defendant (Rec. p. 47)—leaving the jury to pass upon the question as to whether or not the custom of making up the train at Gladstone was a negligent one—and certain expressions of the Circuit Court of Appeals, in its opinion, we would forego any extended comment upon a proposition apparently so elementary.

Judge Pritchard, speaking for the Circuit Court of Appeals, said in his opinion filed in this case (Rec. p. 60):

> "It is well settled where one is employed, as in this instance, he assumes the *ordinary risk* incident to the work in which he is engaged, but he does not assume *such risk as may be due to the negligence of the defendant, its officers, agents and employees.*" (Italics ours.)

He then quotes from a charge of the District Court in the case of *Pederson* v. *D. L. & W. R. Co.*, 229 U. S. 146, evidently obtained from a copy of record in that case, wherein the District Court there indulged in some similar expressions. This charge was in no way considered by this court in reviewing that case, the opinion being confined to the question as to whether or not Pederson was engaged in interstate commerce.

Why the court should have rested its opinion upon the authority of a charge of a District Court upon the question of "assumed risks" when there were extant so many decisions of this court on the subject we are unable to understand. Particularly, since the charge itself seems to be utterly opposed to express adjudications of this court on the subject.

The distinction undertaken to be drawn between *ordinary* risks and risks due to the *master's negligence* is of course unsound, as indicated in the cases cited. The contention is exploded by the decision of this court in the *Horton case, supra* (233 U. S., p. 504).

It is true that the Circuit Court of Appeals in its opinion, says that the doctrine of "assumed risks" is not in issue in this case—evidently meaning the supposed doctrine of the assumed "ordinary risks" to which it theretofore referred. Were this not true the previous discussion of the subject in the opinion was uncalled for. The question of "assumed risks" was conceded by the lower court to be pertinent, though erroneously stated in its charge, (to no portion of which did the plaintiff except); it was inevitably involved in the case, as a mere recitation of the evidence shows; and the misstatement of the doctrine in the lower court's instruction is clear error.

(2)

The doctrine of "assumed risks," as applicable to common carriers, has not been changed by the Employers' Liability Act except in one case "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury and death" of an employee.

This proposition, foreshadowed by previous decisions of this court (*Gulf* v. *McGinnis*, 228 U. S. 173; *Seaboard Air Line Railway Co.* v. *Moore*, 228 U. S. 433; Second Employer's Liability cases, 223 U. S. 1; *N. & W. R. Co.* v. *Earnest*, 229 U. S. 114; *Am. R. Co.* v. *Birch*, 224 U. S. 554) and by numerous decisions of State Courts of Appeal (*Hall* v. *Vandalia R. Co.*, 169 Ill. App. 12; *Neal* v. *Idaho, &c. R. Co.*, 22 Idaho 74, 102; *Barker* v. *Kansas City R. Co.* (Kan. Sup. Ct. 1913), 129 Pac. 1151, 1154; *Freeman* v. *Powell, Receiver* (Tex. Civ. App.), 144 S. W. 1033, 1034, *So. R. Co.*

v. *Jacobs*, 116 Va. 189) finds complete and authoritative expression in the case of *S. A. L. R. Co.* v. *Horton*, 233 U. S. 492, 58 L. ed. 1062, where Mr. Justice Pitney, speaking for the court said:

> "It seems to us that par. 4 (of the act in question) in eliminating the defense of assumption of risk in the cases indicated, quite plainly evidences the legislative intent that in all other cases such assumption shall have its former effect as a complete bar to the action."
>
> See, also, *Southern R. Co.* v. *Crockett*, 234 U. S. 730.

(3)

The method of conducting the business in this case, that is, of shifting and coupling at both ends of the train at the same time, without any notice and warning to those working at the other end of the train, was open, obvious and known to the plaintiff and he, therefore, assumed the risk of any injury from that source.

We have heretofore shown that the plaintiff had been in the defendant's employment for many years. He worked at this particular yard and doubtless on many trains of this character, though he adds that the occasion of his injury was the first time in some time, he had been instructed to throw out any cars. The testimony, including his own admissions, shows not only that this was the long standing custom and method of doing the work at this particular yard of which he admits his familiarity (Rec. pp. 12 and 13), but that he knew on this particular occasion that work of shifting and coupling was in progress at the other end of this particular train simultaneously with the conduct of the work he was engaged in at the front end. "He was ordered" according to his own narrative (Rec. p. 10) "to

go ahead and couple them, and they (those at the rear including the yardmaster, Taylor) would couple up and be ready to go"; "that the yardmaster told him that when he got through with the three cars the train would be ready to do" (Rec. p. 11); that there was a supposition that something was going to be done at the rear end of the train (Rec. p. 11).

Again he says—quoting from the narrative of his testimony—"the yardmaster told him to cut out three cars at the head end of the train, and switch them off on a side track and come back and couple up, and they would be ready to go," (Rec. p. 9) knowing that some shifting must necessarily in the meantime take place at the rear, certainly to the extent in every instance of putting on the caboose (Rec. pp. 12 and 39).

Indeed the plaintiff's version of his instructions differs but little from that of Yardmaster Taylor who says (Rec. p. 17):

"The train came in, had two cars in to come out, two local cars; he set out two cars and held on one car and came back and coupled up to his train and we had work to do at the rear. I told him I had to do the work on the rear and also to do the work at the head and I would do it at the rear so we could get the work done" and that "when we tell the man to go on with the work we both go to work as quick as we can," (Rec. p. 18).

Proffitt further states that he looked before making the coupling and after he looked without seeing any lights he didn't expect anything to be done, admitting inferentially that prior to looking he did. He thinks he ought to have been warned by some signals at the rear end, but that was not customary, the signals there being merely for the use of those working at the rear; the front man, under the custom and method is supposed to look out for himself, (Rec. pp. 18, 19 and 37).

As said by Capell, general yardmaster, "all the warning he knew of being given, or the practice was for the men in and about the train to take care of themselves and see for his own danger when he attempts to do any work, and the witness knew of no signals given, etc." (Rec. p. 37).

We have then before us a case where the long standing custom and practice was for the work of shifting and coupling of cars taken out or put in a "manifest" train to be done at both ends of the train at the same time, that at the front end by the "road" crew and at the rear end by the yard crew; that under the custom and practice and method of doing the work then and there prevailing the brakeman who did the coupling at the front end of the train was to look out for himself and no warning or signals of any kind were given to him, or to be received from him.

The case of *Chicago M. St. P. R. Co.* v. *Voelker*, 65 C. C. A. 226, 129 Fed. 522, 70 L. R. A. 264, is so parallel to the case at bar in all its essential features that we take the liberty of quoting from it at considerable length. The case was decided by Mr. Justice Van Devanter, then United States Circuit Judge.

This decision has been on at least one occasion approved by this court (*Johnson* v. *So. Pac. Co.*, 196 U. S. 19; 49 L. Ed. 370), though upon another phase of the case than the one under discussion, and in its several phases, by numerous courts, both State and Federal, a list of which is appended to this brief as appendix No. 1.

Mr. Justice Van Devanter in that case said:

> "The principal allegations constituting plaintiff's second charge of negligence were: First, the existence of a practice in defendant's yards at Dubuque, long recognized by defendant, and amounting to a general custom, requiring, when a car coupler, also called 'field man,' is engaged between two cars in preparing them for coupling, that other

cars be not moved against those between which he is engaged without a signal from him; and, second, the kicking or sending of other cars forcibly against those between which Voelker was engaged, without a signal from him, and with knowledge of his exposed position between the cars. The evidence shows that the coal car before mentioned was standing on a freight track distant about 800 feet from a switch which connected it with the main track; that the switching crew, with an engine and twelve or thirteen cars, approached the switch from along the main track, and there kicked eight or nine of the cars on to the freight track with sufficient force to send them along that track to or near the coal car; that Voelker accompanied the moving cars, riding thereon, for the purpose of controlling their speed and of effecting a coupling between them and the coal car; that the switching crew then kicked two of the remaining cars down the main track, then kicked the other two cars on to the freight track with sufficient force to send them along that track to or near the cars first kicked thereon, and then followed the two cars sent down the main track. It was the theory of plaintiff's evidence that the cars last kicked on to the freight track moved along that track to the point reached by the cars first kicked thereon, and struck them with such force as to move them against the standing cars and cause the injury to Voelker, who was then between the cars, and engaged in opening the knuckle of the coupler on the coal car, as before stated. Whether the second set of cars actually reached those first sent along the freight track, was, however, the subject of conflicting evidence, as was also Voelker's knowledge of the intention to send a second set of cars along that track. The switching crew did not know of

Voelker's position between the cars, or that there was occasion for him to go between them. He gave no signal to the switching crew indicating that there was occasion for him to go between the cars, and no effort was made by them to apprise him of the approach of the second set of cars, excepting as it was claimed that he was informed, before leaving the switch, of the intended sending of a second set of cars along the freight track. While the switch and standing cars were widely separated, the view between them was unobstructed, so that Voelker and the switching crew could each have ascertained the movements of the other with little effort. It was important, therefore, to know whether it was Voelker's duty to take the precaution necessary to avoid injury from an exposed position between the cars and the movement of other cars, or whether it was the duty of the switching crew to take this precaution. While the evidence respecting the practice in switching cars and the duties to be performed by those engaged therein was conflicting, that produced by defendant, including the testimony of the yardmaster and of the foreman of the switching crew under whom Voelker was employed, tended to show that the practice long established, generally followed, and effective during Voelker's employment, was that this duty rested upon the car coupler, and not upon the switching crew. The custom is stated by one of the witnesses in this manner:

'Where the cars are kicked on to a track, and a man rides down the first cut, and goes into the field, and other cars are kicked in on the same track, it is not customary or a usual thing for the men who are kicking the cars in to wait before kicking in a second cut, to see where the man is who rode the

first cut down. It is not customary for persons kicking in cars in that way to hold up or refrain from kicking them in, after one set of cars is kicked in, until they can see the man in the front, unless they get a signal from him, or something. The man who rides down the first string is called the 'field man," and he is understood to take care of himself, look out for himself. These were automatic couplers on these cars. The field man sets the couplers so if they come together they will catch. When he goes in, and finds he can't couple, and he understands other cars may come down the track his duty is to step out. He don't need to give any signal—step of the way. He would give no signal to the men who were kicking in the cars on the other end, because it wouldn't be necessary. You couldn't stop the cars kicking them in there. It don't make any difference for that coupling, he would let it go. It would be coupled up afterwards.'

Another witness put it this way:

Q. It wouldn't be customary to be looking for that (position of field man)?

A. No, sir. When we switch cars we always kick one cut in, and the field man looks out for them, and keeps on kicking until you get the track filled up.

Q. And then you would kick in cut after cut without looking to the field man at all?

A. Yes, sir. * * *

Q. The field man, as I understand it, is supposed to look out for himself?

A. Yes, sir.

Q. (By the Court): Is there a difference between the action when a switchman or field man is in for the purpose of coupling up the cars?

A. If the field man ain't got all the coupling made, you get hold with your engine, and couple them all up.

As applicable to this state of the evidence bearing upon the second charge of negligence, defendant requested the court to charge the jury as follows:

'If while Voelker was working in the yards it was the general and uniform custom to kick cars down to the field man without giving him any notice or warning, and Voelker continued in the service, such custom being practiced or acted on, he took the risks arising from this manner of kicking cars, and no recovery can be had because of injury to him caused thereby.

'If, while Voelker was working in the yard, it was the general and uniform custom to kick cars down to a field man, so called, without giving him any notice or warning, and Voelker was acting as field man, and cars were kicked down to him wthout giving him notice or warning, and he remained working in the yard while this custom or practice was observed, there can be no recovery for any injury done him because of the kicking of cars to him without giving notice or warning that it was to be done.'

The court refused to so instruct the jury, and gave no other instruction upon the subject. We regard these requests as substantially the same, and think one of them should have been granted. The rejection of both was error. Each is in terms carefully confined to the charge of negligence in kicking or sending down the second set of cars, and each requires that the custom should have been general and uniform, and that Voelker should have continued in the service while the custom was being observed. If it was general and uniform, and was

observed during his continuance in the service, it was manifestly within, not merely his means of knowledge, but his actual knowledge. He was an experienced railroad employee, and was familiar with this branch of that service, having been in defendant's employ as a brakeman and switchman for a period of eight years. He therefore understood the dangers incident to the observance of such a custom. There can be no claim, under the evidence, that the injury was wilfully or wantonly inflicted. Nor was the custom an unreasonable one. Whether or not there was occasion to go between the cars, and thus assume a position of exposure to injury from the movement of other cars, would be known to the field man, but not to the switching crew. His position would also enable him to judge of the character and probable duration of the exposure better than could be done by others. He would be primarily in a place of safety, would know that the work in which he was engaged was, in a larger sense, that of moving cars and making up trains, and, being in control of his movements, would not assume a position of danger without some volition of his own. If, in the presence and during the observance of a general and uniform custom of the character stated, Voelker continued in the service of defendant, he assumed the risk of injury arising from its observance."

The striking similarity of that case with case at bar renders comment scarcely necessary. If we substitute the plaintiff here for the man there spoken of as the "field" man—the brakeman who went ahead to do the coupling while other cars were being shunted in—the analogy seems complete.

The charge of negligence made in the instant case, is practically identical with the second charge of negligence in the *Voelker case, i. e.,* the kicking or sending of other cars forcibly against those between which the plaintiff was engaged without giving him notice or warning, or as said in the *Voelker case,* without a signal from him.

Paraphrasing further the language of Mr. Justice Van Devanter in that case, we might say that *it was important here to know whether it was the plaintiff's duty to take the precaution necessary to avoid injury from an exposed position between the cars and the movement of other cars, or whether it was the duty of the switching crew to take this precaution.* In that case there was some dispute as to the custom—there is none here—which was that the plaintiff should look out for himself. If the plaintiff continued in the service with knowledge of such a custom he assumed the risk of injury arising from its observance.

There being no dispute as to these facts in the instant case the court should have directed a verdict for the defendant, since the alleged violence of the impact constituted no ground of complaint, as will be hereinafter shown.

(4)

Instruction "B," on the subject of the assumption of risks, as asked for by the defendant, should have been given and the modification thereof by the court was improper and should not have been given, since it was violation of the doctrine of "assumed risks."

Assuming the law on this to be as set forth in the cases cited, particularly the *Voelker case,* which has been referred to at some length, the error of the court in modifying the instruction as it did is at once apparent.

For convenience instruction "B" as asked for by the defendant and one of the two similar instructions which had the approval of the court in the *Voelker case,* and for the

lower court's failure to give which the case was reversed, are appended to this brief, as Appendix No. 2.

The only difference between instruction "B" as asked for by the defendant here and the instructions approved in the *Voelker case* is that the latter allowed the jury to pass on two elements, which were in dispute in that case and which are not in dispute here, viz: (1) Voelker's knowledge of the custom if it existed, and (2) his continuance in service with such knowledge.

It is admitted in this case that the plaintiff had knowledge of the custom, whatever it was—he himself admitted his knowledge of it—and that he had continued in the service with such knowledge and without objection is a conceded fact. Indeed as a matter of fact we have shown that there is no dispute in this case that the custom and practice was just as detailed by the defendant's witnesses. Assuming for the moment, however, that this was debatable, there was certainly overwhelming evidence to that effect.

The modified instruction "B," as given by the court, and which is appended to this brief as Appendix No. 3, conceded, as did the instruction asked for, that the plaintiff had knowledge of the custom and remained in the employment with such knowledge, it being silent as to those questions, the vital change being that under the modification, in order for the doctrine of assumption of risks to apply, as to the custom and method of doing the work, the jury should further believe from the evidence "that such method was one that reasonably prudent and careful men would have adopted in the conduct of its business."

This modified instruction is based on the mistaken theory that the doctrine of assumption of risks does not apply to a negligent method of doing business even where the method and danger therefrom is actually or constructively known to the servant and he continues in the employment without objection. We have heretofore at some length undertaken to show how erroneous this theory is. It may be that the

doctrine of assumed risk does not apply in a case where "the visible conditions may have been of *recent origin*, and the danger arising from them may have been *obscure*." * * * "But where the conditions are constant and of long standing and the danger is one that is suggested by the common knowledge which all possess, and *both the condition and the dangers are obvious to the common understanding, and the employe is of full age, intelligence and adequate experience*, and all these elements appear without contradiction, from the plaintiff's own evidence," the doctrine applies in so vigorous a fashion that "*the question becomes one of law for the decision of the court.* Upon such a state of the evidence a verdict for the plaintiff cannot be sustained, and it is the duty of the presiding judge to instruct the jury accordingly." *Butler* v. *Frazee*, 211 U. S., p. 466, 467. (Italics ours.)

We desire to add further that there was no evidence in the case showing or tending to show that the custom and method prevailing at Gladstone, in making up the trains, was in any way negligent or unreasonable and the modification of instruction "B" was erroneous on that account.

Indeed, Mr. Justice Van Devanter in the *Voelker case* says of the similar custom prevailing under the facts of that case that it was not an unreasonable one.

In no event therefore was the modification of this instruction proper, even if the court was justified in refusing to direct a verdict for the defendant.

Referring to the question of the assumption of risk, it is said by the Circuit Court of Appeals in its opinion (Rec., p. 61):

> "This question, according to our view, is not at issue in this controversy. It is not alleged in the declaration that the method employed by the defendant company of working a crew at each end of the train was an act of negligence, nor is it alleged

> that the custom as respects the shoving together of cars at a reasonable rate of speed amounts to negligence on the part of the defendant. On the other hand, it is alleged that the cars were being 'carelessly, negligently and without giving him any notice, or warning, and without taking any precautions backed by its engines * * *with great force and violence and at a great and improper speed.' "

The court is here evidently referring to its definition of "assumed risks,"—applying the term to what it erroneously conceives to be the *ordinary* risks of the employment as distinguished from risks due to negligence of the employer,—and having this distinction in view indulges in the above comment.

The negligence charged is (a) the failure to give warning and (b) the improper speed at which it is alleged the cars were driven in.

Now there was evidence in the case tending to show that the cars were not driven in at an improper or unusual speed and that the lick was no harder than usual. (See Record—Taylor, p. 18; McCoy, p. 21; Jackson, p. 25; Cunningham, p. 27.)

This was then of course a question for the jury and the court itself conceded that there was "a sharp conflict of evidence" in regard to it (Rec., p. 60).

If the jury believed the evidence of the defendant on this subject then the plaintiff was relegated to his other charge of negligence—the failure to give notice or warning—and this has been shown not to have been customary. Under the custom it was the duty of the plaintiff to look out for himself—certainly there was plenty of evidence to that effect—and the pertinency of the assumption of risk doctrine to the situation is at once apparent, even though that custom may have been a negligent one.

The plaintiff himself says (Rec., p. 12): *"the work was the same as before but the lick was harder than usual."*

It may be here observed that there is a conflict of evidence as to whether or not there was a head brakeman, with a lantern, on the front end of the "cut" of cars being shoved in at the rear of the train, and it is said that his absence would be negligence of which the plaintiff could complain. He made no such complaint, even if it were available, unless it be included in the general charge of failure to give notice. But these signals were not intended for him any way; they were intended merely to control the movements of the switch engine, working at that end of the train (Rec., p. 19), and the plaintiff therefore, could not complain of their absence. *St. L. & S. F. R. Co.* v. *Conarty*, Advance Opinions U. S. Sup. Ct., 1914, p. 786.

As above set out, however, there was plenty of evidence—including that of the plaintiff himself—that the whole operation was performed in the customary way. There was evidence that a man, with his lantern, was in the front end of the "cut" of cars being shifted in, and that the other members of the crew were in their proper places. If the injury was the result of that method of doing the work, there could be no recovery.

(5)

A negligent method of doing the business is the foundation of the case at bar and the basis of several instructions whereas it was no ground of liability.

From what we have just said it is at once apparent that there can be no recovery in this case based on an alleged negligent method of doing business because of the application of the doctrine of assumption of risks; and because there is no evidence tending to show that the method was negligent. And yet when we analyze the case it is really based upon that theory .

This is apparent from a critical examination of instructions 1 and 2 given for the plaintiff. These instructions are appended to this brief as Appendix No. 4.

It will be observed that instruction No. 1, tells the jury that if it was necessary or usual for the plaintiff, in doing such work as he was to do, to place himself between the cars while coupling the air hose, within the knowledge of Yardmaster Taylor, "then it was the duty of the said defendant by and through its said yardmaster to exercise ordinary care to prevent, *without due notice being given to the plaintiff*, the said cars so to be attached (referring to the cars to be attached by the yard crew at the rear) from being driven or moved at *an excessive or unusual speed*, etc.," and that for injury caused the plaintiff thereby the defendant was liable.

Instruction No. 2 is similar and tells the jury if the plaintiff was injured, while doing the work he was instructed to do, by reason of other cars "being driven or moved through the negligence of any of its employees, managing or at work on the last mentioned cars, *without any notice or warning to the plaintiff and with improper and unusual force and speed* against the car upon which the plaintiff was at work" then the defendant was liable. We have italicized the words showing the duties defined as being owing the plaintiff by the defendant. These duties are defined apparently as the duty of giving notice and the duty of not using undue speed and force when the other cars were to be coupled on to the cars between which the plaintiff was at the time of the injury. These instructions are both predicated upon the duty of giving notice or warning to the plaintiff which, as we have shown, is in the teeth of the custom. The first instruction it is true says notice was to be given, if the cars coupled from the rear, were driven with unusual speed and violence. But if the duty of giving notice applies in that instance it would apply in any other instance in which the plaintiff would be liable to be injured, and this is the case

in every instance that cars are coupled in that way, whether the force of the impact is unusual or otherwise as we shall presently show. Again if the instruction is predicated on the theory that the violence of the impact is the violation of the duty why complicate that with the question of notice? In that case the failure to give notice or otherwise doesn't enter into the matter except as affecting the plaintiff's knowledge of what was about to happen and giving the defendant the benefit of that as a defense on the question of contributory negligence.

There seems to be an implied admission in these instructions that the violence of the impact, alone, was not a breach of duty—and we do not think it was—and that it was necessary to add to that a further duty of giving notice, which, however, was in direct opposition to the customary method of doing the work, and that, as we have shown, is the controlling factor in the case on this question. In any aspect of the case the addition embodying the idea of notice is plainly misleading.

It will be observed that none of the employes had any knowledge of the plaintiff's presence between the cars at the time the coupling was made at the rear of the train.

(6)

There could be no recovery in this case for an injury to the plaintiff occasioned by the alleged violence of the impact caused by the cars coupled from the rear of the train, even if it were the proximate cause of the injury.

Instruction "D" on this subject, asked for by the plaintiff and refused, is appended to this brief as Appendix No. 5, the words "and that" in parentheses being a grammatical error, which however in no way alters the sense of the instruction. This instruction should have been given.

The employes working at the rear of the train had no knowledge of Proffitt's presence between the cars. Under the custom prevailing he was to look out for himself. It was customary to shunt the cars in at a speed of three or four miles an hour (Rec., pp. 26 and 35), which was the speed at which they were shunted in, in this case (Rec., p. 36). How far the cars rolled in after they had been cut off from the engine, or whether they had gained any momentum on the slightly down grade or if so how much, does not appear, except there is some evidence that the impact when they struck the other cars was quite severe, though not severe enough to break anything about the cars (Rec., p. 25).

This same claim of the violent manner in which the coupling was made was in the *Voelker case* and it seems to have received but scant consideration there.

It will be observed that necessarily a large number of cars, twenty-seven or twenty-eight, striking a much smaller number, about eight or nine, necessarily drove the smaller number forward a considerable distance, the brakes not being set on the smaller number of cars, apparently, being only set on the road engine which had separate brakes (Rec., p. 14).

What right had the plaintiff to complain of that?

He was supposed to look out for himself, under the custom. There was no duty owing to him of making the coupling at any particular degree of force which might have been the case if he had not been supposed to look out for himself, or if the servants of the defendant had any actual knowledge of his presence between the cars, which was not the case.

(7)

There was no evidence in the case showing or tending to show that the violence of the impact caused by the cars

coupled from the rear of the train was the proximate cause of the injury to the plaintiff.

Instruction "E," on this subject, as asked for by the defendant, was we think a correct exposition of the law.

This instruction was modified by the court in certain particulars and given as modified. The instruction and modification are appended to this brief as Appendix No. 6.

The instruction, as asked for, tells the jury that even tho' they might believe the impact referred to was unusually violent still "in the absence of affirmative preponderating evidence that said unusual and violent impact was the proximate cause of the injury to the plaintiff, they must find for the defendant."

The modified instruction tells the jury that "the mere fact that the cars were being shifted in an unusual and violent manner, will not entitle the plaintiff to recover *on that account*, unless they believe it was the proximate cause of the accident." (Italics ours.)

In two particulars is the modification erroneous. In the first place it leaves the jury to infer that although the plaintiff could not recover *on account of the violence of the impact*, unless they believed it was the proximate cause of the injury, still that *on some other account* there might be a recovery and this was necessarily the supposed negligent method of doing the work, an error which permeates this whole record.

In the second place the court refused to tell the jury that in order for there to be a recovery on that account there must be "affirmative preponderating evidence that said unusual and violent impact was the proximate cause of the injury."

We will add that there is no such evidence in the record and consequently there can be no recovery in this case, as outside of the alleged negligence as to the method of doing the work, for which there could be no recovery, this is the only other ground of negligence charged or relied upon.

The rule as to this class of cases is very clearly stated by Mr. Justice Brewer in *Patton* v. *Ry. Co.* 179 U. S. 663.

> "That while, in the case of a passenger the fact of an accident carries with it a presumption of negligence on the part of the carrier, a presumption which, in the absence of some explanation, or proof to the contrary, is sufficient to sustain a verdict against him, for there is *prima facie* a breach of his contract to carry safely (*Stokes* v. *Saltonstall,* 13 Pet. 181, 10 L. ed. 115; *New Jersey R. and Transp. Co.* v. *Pollard,* 22 Wall 341, 22 L. ed. 877; *Gleeson* v. *Virginia Midland R. Co.,* 140 U. S. 435, 443, 35 L. ed. 458, 463, 11 Sup. Ct. Rep. 859), a different rule obtains as to an employe. The fact of accident carries with it no presumption of negligence on the part of the employer; and it is an affirmative fact for the injured employe to establish that the employer has been guilty of negligence. *Texas & P. R. Co.* v. *Barrett,* 166 U. S. 617, 41 L. ed. 1136, 17 Sup. Ct. Rep. 707.
>
> Second. That in the latter case it is not sufficient for the employee to show that the employer may have been guilty of negligence; the evidence must point to the fact that he was. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion. If the employee is unable to adduce sufficient evidence to show negligence on the part of the employer, it is only one of the many cases in which the plaintiff

> fails in his testimony; and no mere sympathy for the unfortunate victim of an accident justifies any departure from settled rules of proof resting upon all plaintiffs."

It is believed that the case comes squarely within the doctrine of that case.

It is admitted by the plaintiff that there is always a certain amount of jar connected with coupling of cars (Rec., p. 12).

How far the usual or ordinary jar necessarily incident to such a coupling would knock the cars is not clear from the evidence, though it appears to be ordinarily somewhere between 3 and 8 feet. (Rec., pp. 21, 22, 25 & 27.) It would perhaps be a much greater distance where a large number of cars, as here, are coupled to a much smaller number, than otherwise, the momentum of the larger mass necessarily having greater effect upon the smaller number than would ordinarily be the case. (See Rec., p. 36.)

In any event, the fact that the impact made by coupling one set of cars to another car or set of cars is liable to injure an employee between them is a matter of common knowledge. Indeed, the danger is so great that Congress was moved to pass what is known as the Safety Appliance Act, requiring cars to be equipped with couplers "coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars"—a law which, we might add, was complied with by the defendant in this case.

Railway companies have been and are held to a very high degree of responsibility in case of their failure to comply with this act, being subject to a fine, and being further deprived of the defense of assumption of risks in a case where an employee is injured thereby. This is doubtless because, as was said by Judge Van Devanter in the

Voelker case, upon another phase than that heretofore discussed:

> "The risks and dangers which attended the old link and pin system, when couplings and uncouplings were effected by going between the cars, *were such a menace to the lives and limbs of those employed in that branch of the service, and these risks and dangers, inhered so largely in the act of going between the cars*, whether in the act of coupling or uncoupling, that there can be no doubt of the purpose of the congressional enactment as well as that of the state to obviate and prevent this act of exposure, which the invention and use of automatic couplers had demonstrated to be wholly, or at least largely, unnecessary." (Italics ours.)

The employe here was coupling the air hose, no automatic device for that being yet devised, but the danger from that, if other cars are to be coupled to the train is just as great.

When such an act "is a menace to life and limb" and necessarily *inheres "in the act of going between the cars"* how can the jury be allowed to say, when an employe is injured thereby, that the usual and violent impact, even if such, was the proximate cause of the injury or be permitted to speculate on that subject in the face of the everywhere admitted fact that the act itself is fraught with so much danger as to require an act of Congress on the subject? There is necessarily some impact—the statute requires cars to be equipped with couplers "coupling automatically *by impact*." (Italics ours.)

(8)

The instruction given by the court on the measure of damages, as asked for by the plaintiff, was erroneous on

the question of the allowance of compensation (a) *for "any physical pain" the plaintiff "will suffer in the future" and* (b) *for being unable to follow his calling or to do "any other work he would have done had he not been injured."*

(a) The instruction to the jury allowing them to give damages for compensation for *any physical pain* the plaintiff *will suffer in the future* is clearly erroneous because——

The instruction does not limit the pain to such pain as results from the injury but, on the contrary "any pain" he may suffer. This seems the grammatical resultant of the language of the instruction which after allowing for "any physical suffering *arising from the injury*" further says, "and *any physical pain* he will suffer in the future," no matter from what source,—when the instruction is considered grammatically.

There is no evidence or allegation that the plaintiff will suffer any pain in the future and it is remote, problematical and conjectural, and it was not claimed in the declaration.

While future physical suffering from injury is sometimes allowable as an element of damage "only such damages can be recovered as the evidence makes reasonably certain will necessarily result from the injury sustained." 13 Cyc. 139.

In *Smith* v. *Milwaukee, &c.*, 91 Wis. 360, 30 L. R. A. 504, the court said:

> "The jury were instructed on the subject of damages that the plaintiff would be entitled to compensation for the pain and suffering which she had endured, also for the pain which it may be likely or that there is a reasonable probability that she will endure in the future. This was error. The plaintiff is entitled to recover for such future pain as the

evidence shows she is reasonably certain to endure."

Citing *Block* v. *Milwaukee Street R. Co.*, 89 Wis. 371, 27 L. R. A. 365, to which decision the court is also referred. It is there said that the degree of proof required for this class of damages "must amount to a reasonable certainty."

See, also, *Ford* v. *DeMoines*, 106 Iowa 94, 75 N. W. 630; *Shultz* v. *Griffith*, 103 Iowa 150, 40 L. R. A. 117; *N. &c. Co.* v. *Spratley*, 103 Va. 388; 1 Joyce on Damages, sec. 246; Watson on Pers. Inj., sec. 384.

The only evidence on this subject is the statement of the plaintiff which is short, and is now quoted at length (Rec., p. 10):

> "Asked if he had been doing any work, and was able to do any work he could do, since he was hurt, the witness stated that he had been at home helping his father on the farm; that his arm was cut off in consequence of the accident.
>
> Asked if he had entirely recovered, the witness answered, 'No, sir, it has recovered up here (indicating his arm), but hurts my hand' (meaning the hand that was cut off). Asked if he ever suffered from his arm he answered, 'Yes, all the time and that it was worse in bad and rainy weather than at other times.'"

There is no evidence here that this state of affairs will continue.

As was said by the court in *Shultz* v. *Griffith, supra*, "True plaintiff testified to his condition up to and at the time of the trial, but there is no evidence whatever to show that that condition would continue." Indeed this would require the expert testimony of physicians, none of which was introduced. Watson on Pers. Inj., sec. 604.

Damages for future suffering was allowed in *Washington, &c. v. Harmon*, 147 U. S. 584, only because the evidence showed there would be such future suffering. See page 584, where it is said, "but there was evidence which justified a finding that future damages would *inevitably* and *necessarily* result, and *this being so*, there was no error in the instruction on that subject." (Italics ours.)

See 1 Joyce on Damages, secs. 246, 276.

(b) The plaintiff was allowed to recover by the instruction complained of, not only for loss he might reasonably be expected to suffer by reason of not being able to follow his trade or profession, which was proper, but further for loss by reason of being incapable of "doing *any other work* he would have done had he not been injured," which was improper.

There was no evidence showing or tending to show what "other work" the plaintiff could or could not do and the jury was allowed to speculate *ad libitum* on that subject. 1 Joyce on Damages, sec. 246 and cases cited.

The damages allowed for incapacity to do "other work" are too remote.

It is broad enough to include loss from possibility of promotion in his profession which was condemned in *R. & D. R. Co.* v. *Elliott*, 149 U. S. 267, a case which shows the extreme length the jury may be allowed to go in this class of cases. (See page 268).

The court there said:

> "It is enough to prove what the plaintiff was in fact deprived of: to show his physical health and strength before the injury, his condition since, the business he was doing (citing certain cases); the wages he was receiving, and perhaps the increase which he would receive by any fixed rule of promotion. Beyond that it is not right to go and intro-

duce testimony which simply opens the door to a speculation and possibilities."

It is broad enough to include loss of prospective profits or remuneration from "any other work" the plaintiff might have engaged in had he not been injured, specifically condemned in *Boston, &c. Ry. Co.* v. *O'Reilly*, 158 U. S. 334.

In short the jury was permitted to speculate, in the absence of evidence on the subject, what work the plaintiff might or might not have done but for the injury and to award damages for "*any loss*," of any kind prospective or otherwise they might think he has suffered on account of the injury.

See also the case of *N. & W. R. Co.* v. *Holbrook*, decided by this court January 5, 1915 (condemning an instruction giving the jury "occasion for indefinite speculation" and inviting "a consideration of elements wholly irrelevant to the true problem presented—to indulge in conjecture instead of weighing established facts"). Advance Opinions, 1914, p. 143.

CONCLUSION.

In conclusion it is urged that for the failure of the District Court to direct a verdict for the defendant, for the errors of that court in connection with the instructions given, refused and modified, and for the refusal of that court to award the defendant a new trial, all of which rulings were affirmed by the Circuit Court of Appeals for the Fourth Circuit, this case should be reversed and remanded.

Respectfully submitted,

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APPENDICES.

APPENDIX No. 1.

Citations of the Voelker Case.

U. S. v. *Ill. Cent. R. Co.*, 156 Fed. 190 (on the safety appliance feature); *Sunderland Bros.* v. *R. Co.*, 158 Fed. 880 (*Idem*); *St. L. &c. R. Co.* v. *Delk*, 158 Fed. 933 (*Idem*); *M. K. & T. R. Co.* v. *Wilhoit*, 160 Fed. 441 (on the assumption of risk feature and restating the rule); *U. S.* v. *A. T. & St. F. R. Co.*, 163 Fed. 517 (on the safety appliance feature); *Chicago &c. R. Co.* v. *King*, 69 Fed. 372 (*Idem*); *Hohenleiter* v. *So. Pac. R. Co.*, 177 Fed. 797 (*Idem*); *U. S.* v. *Ill. Cent. R. Co.*, 177 Fed. 803 (*Idem*); *Johnson* v. *Great N. R. Co.*, 178 Fed. 647 (*Idem*); *U. S.* v. *Or. S. L. R. Co.*, 180 Fed. 484 (*Idem*); *S. R. Co.* v. *Snyder*, 203 Fed. 868 (*Idem*); *McGarvey* v. *R. Co.*, 83 Ohio St. 390 (*Idem*); *Rich* v. *R. Co.*, 166 Mo. App. 384 (*Idem*); *Daly* v. *Ill. Cent. R. Co.*, 170 Ill. App. 195 (*Idem*).

APPENDIX No. 2.

Instruction "B," as Asked for by Defendant and Refused.

"B"—The court instructs the jury that if they believe from the evidence that the method adopted by the defendant in making up the train at Gladstone was the usual and ordinary method of doing this work, then they are instructed the plaintiff assumed all the risks incident to the said method of doing the work and they cannot find a verdict for the plaintiff because of any injury received on account of said method of doing the work even though they believe from the evidence that the said method was the direct and proximate cause of the injury to the plaintiff.

Instruction Approved in Voelker Case.

"If, while Voelker was working in the yard it was the general and uniform custom to kick cars down to a field man, so called, without giving him notice or warning, and he remained working in the yard while this custom or practice was observed, there can be no recovery for any injury done him because of the kicking of cars to him without giving notice or warning and that it was to be done."

Appendix No. 3.

Defendant's Instruction "B" as Modified.

"B."—The court instructs the jury that the defendant company has the right to adopt reasonable rules and regulations for the conduct and method of handling its train of cars on its yards, and of making up its trains for their departure therefrom, and if they believe from the evidence that the custom prevailed at Gladstone yard at the time of the accident on which the occurrence happened of making up the train from both ends at the same time, that is, by working the train engine and crew at the forward end, and the yard engine and its crew at the rear end, and that such method was one that reasonably prudent and careful men would have adopted in the conduct of its business, then they are instructed that the plaintiff assumed the risks reasonably and usually incident to and arising from such method of making up trains; and they cannot find a verdict for the plaintiff because of any injury received solely on account of said method of making up the train, although they may believe from the evidence that the method adopted was the direct and proximate cause of the injury to the plaintiff.

Appendix No. 4.

Plaintiff's Instructions Nos. 1 and 2.

1. If the jury believe from the evidence that it was necessary or usual, within the knowledge of the yardmaster, Taylor, for the plaintiff when attempting, in obedience to the order of said yardmaster, in the night time to couple or connect the air hose upon two cars of the train of the defendant, to place himself in part between said cars, so that he would be unable to see or ascertain the approach of the other car or cars of said train, which were being moved, in order that they might be attached to one of the said two cars, then it was the duty of the said defendant by and through its said yardmaster to exercise reasonable and ordinary care to prevent, without due notice being given to the plaintiff, the said cars, so to be attached, from being driven or moved at an unusual and excessive speed and with great and unusual violence against one of the said cars upon which the plaintiff was doing the coupling as aforesaid, as to cause the last mentioned car to strike the plaintiff while so at work, to knock or shove him down and run over him, and if the said yardmaster did not exercise such reasonable and ordinary care, and his failure so to do was the proximate cause of the accident, then they must find for the plaintiff.

2. If the jury believe from the evidence that the plaintiff, while at work upon certain cars of the defendant under the order of the yardmaster, was injured by reason of other of its cars being driven or moved through the negligence of any of its employees, managing or at work on the last mentioned cars, without any notice or warning to the plaintiff and with improper and unusual force and speed against the car upon which the plaintiff was at work, that is such negligence on the part of the defendant as will make it liable to the plaintiff if such negligence was the proximate cause of the accident.

APPENDIX No. 5.

Instruction "D" Asked for by the Defendant and Refused.

"D"—The court instructs the jury that even though they believe from the evidence that in shifting the cars into the cut of cars among which the plaintiff was injured while coupling the air hose of two of the cars (and that) the impact was greater and more violent than usual still they cannot find a verdict for the plaintiff on that account alone.

APPENDIX No. 6.

Instruction "E" Asked for by the Defendant and Refused.

"E"—The court instructs the jury that before they can find a verdict for the plaintiff, the plaintiff must not only show by the evidence that the defendant was negligent, but that such negligence, if it existed, was the proximate cause of the injury to the plaintiff; therefore they are instructed that even though they may believe from the evidence that the cars were shifted in and coupled to a cut of cars among which the plaintiff was injured while coupling the air hose of two cars and that the impact was unusually violent, still in the absence of affirmative preponderating evidence that said unusual and violent impact was the proximate cause of the injury to the plaintiff, they must find for the defendant.

Instruction "E" of Defendant as Modified by the Court.

"E"—The court instructs the jury that in order for the plaintiff to recover, he must establish the negligence of the defendant by a preponderance of the evidence, and that such negligence of the defendant was the proximate cause of the injury to him; and they are further instructed that although they believe that the cars that were being shifted in and coupled to a cut of cars on which the plaintiff was injured while coupling the air hose of two cars, were being moved and operated with unusual speed and force, still the mere fact that the cars were being shifted in an unusual and violent manner, will not entitle the plaintiff to recover on that account, unless they believe that it was the proximate cause of the accident.

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
Plaintiff in Error,

v.

CLAUDE L. PROFFITT, Defendant in Error.

On Writ of Error to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR CLAUDE L. PROFFITT, Defendant in Error.

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TABLE OF CASES AND AUTHORITIES CITED.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1915.

No. 273.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,
PLAINTIFF IN ERROR.

v.

CLAUDE L. PROFFITT, DEFENDANT IN ERROR.

ON WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR CLAUDE L. PROFFITT, DEFENDANT IN ERROR.

I.

STATEMENT OF THE CASE.

In the night time of July 2, 1912, between three o'clock and half past three, the defendant in error, as a brakesman

upon a train of the plaintiff in error, was required by the yardmaster of the plaintiff in error at the Gladstone yards to assist in making up a train about to be started eastward. The train was a manifest or fast freight, and had come from some of the western States.

Sometimes, when necessary, when such a train reached Gladstone, certain cars were removed and others attached. It was claimed by the plaintiff in error that, in taking out or putting in cars, which have to be taken out or put in, it was customary for the crew of such train to do such work on the front end of the train, on the end near the train engine, and for the crew of yard or switch engine to do the work needed on the other end of the train (p. 17). It appears that the yardmaster thought that work was necessary on both ends of that train and ordered the respective crews to do such work.

The train consisted of an engine and thirty-five or forty cars. The yardmaster ordered the defendant in error to cut out the second, third and fourth cars from the engine and put them on track No. 6, and then to couple up to the train "and they would be ready to go," (p. 9). The defendant in error, as ordered, cut out those cars and left them on track No. 6, and then came back upon the main track as did the engine and the first car which remained attached to the road engine. Then the engine and this car was backed to the other cars of the train left standing on the main track. The car attached to the engine and the first car left standing on the track were automatically coupled to each other; but it was necessary to couple the air hose by hand. To do that, the defendant in error had to step within the tracks and attach the two ends of the air hose together. Before attempting to do that work, he looked down the track, but saw no light nor any signal. The plaintiff was not aware of the fact that under the orders of the yardmaster the train by means of the switch engine had been again divided—that is, that seven or eight of the cars had been left standing still, and the rest, or twenty-

nine in number, had been carried away from them by switch or yard engine, so that some other car or cars might be cut out from them. "He did not know the yard engine was at work on the rear end of the train *pushing* cars up to it—page 9. He, therefore, had no notice or warning that there was any danger of the cars, which had been carried off by the switch engine, being shoved by the yard engine, or being "kicked" by it, against the cars left stationary on the track, and to which he had been ordered to couple the car attached to the road engine.

Having no knowledge of such danger, and having looked down the track and seen no light or signal, he stepped between the cars and hitched together the two ends of the air hose. While so at work he was struck by the car to which he had been ordered to couple the car attached to the engine; he was knocked down and run over by the car which struck him. His right arm was cut off close to the shoulder; he was thus disabled for life.

The record shows that the injury was caused by the negligence of the company. Had the company done its work in its usual manner, there is no probability that the accident would have happened.

Two witnesses, still in the employ of the company, testified that, when the rear cars, which had been carried off by the yard engine, butted into the stationary cars, the violence of the blow was so great that it knocked one of them, the fireman, on the road engine backward into the coalbin, and knocked the engine and tender forward for twenty feet, although the engine brake was on. One of them said it was the hardest lick he had ever been in in eight years' experience. The other said he could not tell whether or not he had ever experienced such a blow. These witnesses were Perkins, fireman on the road engine, and Toone, the engineer on the same (pp. 13 and 40). These men were within one car length of the spot where Proffitt was injured and went to his rescue. They both testified that they measured the distance the engine was moved. It

was their duty to ascertain such a fact in order to make the required reports of an accident. The report of Perkins was produced and read to the jury and it appears therein, that he reported therein that the engine was by the blow, knocked twenty feet. See Exhibit No. 1, referred to on page 16 and sent up as an original exhibit by the trial court.

In the light of such testimony there can be no doubt as to the extreme violence of the blow, nor as to the distance the engine was knocked. It is true that some of the witnesses for the plaintiff in error speak in an indefinite way of the cars being knocked about three or four feet (p. 21) or about six or eight feet (p. 25); but they admit that they made no measurement nor had any positive knowledge. In fact, they were a long distance from the point of collision and could know and knew little or nothing about this matter. The one who did not think the engine moved over three or four feet (p. 21) admits (p. 22) that "it was mere guess work with him."

The plaintiff in error defended upon the ground, that it was customary, if necessary, for the train crew to work on one end of a manifest train, when being made up, while the yard crew would work on the other end, and that the rear cars were shoved back "very light" by the yard engine, that a colored brakesman of the yard crew, named Jackson, rode on the first car (that was being backed), with a lantern (p. 18), that it was his duty, when the moving cars approached the stationary ones to get down on the ground and by signalling with his lantern to get the engineer to slow down the train, so that the cars would come together and couple up "easily," (p. 20).

This witness for the railroad company, the yardmaster, Taylor, however, after having stated that this man, a colored brakesman named Jackson, was on front of the car as it backed up to the cars standing on the main track, on cross examination page 18—admits when asked, "whether he knew if the brakesman was in his position at the time"

(of the impact) or not, stated, "*I don't know it*, but he got down and passed me ahead." That Jackson was not on the end of the section of cars which was being pushed against the cars standing on the main track where it was customary and his duty to have been, is proved by John H. Carter, the witness and engineer (of the railroad company) in charge of the yard engine, which was pushing the cars; on the front one of which Jackson should have been. He was the engineer of the yard engine and says—page 29—"Charles Jackson, the colored brakesman who done the switching up there *was standing on the pilot step on my side*," of the engine. The witness on being further questioned about Jackson's whereabouts by counsel for the railroad company and by the trial judge (both of whom saw the importance of this evidence), reiterates his statement and makes it very clear that there is no manner of doubt in his mind about Jackson being out of the place where his duty required him to have been (page 30). This explains the failure of Proffitt to see the light on the approaching cars and also the fearful and unusual speed at which they approached the eight cars standing on the main track which caused the injury to the appellee. There was no one on the front of the approaching cars to control their speed and make the impact "easy." If, as was the custom, "a man rides on the foremost car to control it with hand brakes" (p. 38), the cars would have come together easily or as Perkins testified (p. 14) with "no jar at all."

Carter, a witness for the company, testified that in switching cars at the yard, *the rules required* that a man must ride on the head car of those which are being shoved (p. 31).

That line of defense proved that the defendant in error was entitled by reason of such a custom to expect that there would be a light shown before any cars would be backed against those upon which he was working, or upon cars attached to those upon which he was working. It made no difference for what purpose the man and light were there,

whether to flag the engine pushing the cars, or to warn people of its approach, though doubtless it was both, the rule of the railroad company required a light on every car in the yard moved at night (p. 31 of record). Had this customary course been pursued the defendant in error would have had due notice of the approach of the cars, and the injury would not have been inflicted. Had this man been on the moving cars, there would have been no unusual and violent impact. He would have controlled the speed of the cars (p. 38 of record), where appellant's expert witness says after saying it is more dangerous to kick cars on the yard than to push them by engine, "In kicking cars, a man rides on the foremost car to control it with hand-brakes."

The indisputable evidence shows that that usual course, which would have been so beneficial to Proffitt, was not pursued that night. Proffitt said he saw no such light. Perkins and Toone proved that no such waving down signal could have been given, since the moving cars butted into the stationary ones with so much violence as to knock the engine and tender and eight or nine cars a distance of twenty feet, although the engine had its brake on.

Such evidence shows that Jackson did not pursue the ordinary course—that he gave no signal with his lamp for the slowing down of the cars—and hence, prevented Proffitt from having any notice whatever of the pending danger, while he did his duty in the darkness of the night; and that Jackson did nothing to control the speed of the car.

But there is other evidence in the record which proves that this customary course was not pursued, but a course, which produced the violence with which the moving cars approached and caused the defendant in error to be knocked down and run over.

The plaintiff in error put upon the witness stand John H. Carter, the engineer on the yard engine. He testified that the cars were not *pushed* back to the stationary ones by his engine. He filed with his testimony a sketch of the location and the several tracks. From it there appears that

there is a track called the lead track, into which run several tracks which are numbered—that the train was standing on track No. 8. He testified that his engine went into No. 8 track, coupled up to the rear of the train and came out into the lead track with many cars, said to number twenty-nine cars; that after bringing them into the lead track, he carried them and left one or two upon one or more of the other tracks; that he then came back with the rest of the cars and turned them back into No. 8 track; that the yardmaster, Taylor, and the colored brakesman, Jackson, *were standing on the pilot step of his engine,* and gave him a signal to slack up, so that the pin coupling his engine to the cars could be drawn; that he obeyed the signal, and that they drew the pin and thus cut loose the cars upon No. 8 track, while moving at the rate of three or four miles an hour; that he thus gave them a start and "where the cars went I do not know" (pp. 29-30-31-32).

This testimony flatly contradicted Taylor, the yardmaster, and Jackson, a yard brakesman, and fully explains why Proffit never had a chance to see the light of Jackson's lamp, and why the cars increasing in momentum, for it was down grade (p. 36), came with such violence as to knock the stationary cars and the tender and engine twenty feet.

The railroad company doesn't claim that any one but Jackson rode on the front car of the rear part of the train as it proceeded to strike the cars standing on the track, and it being shown by appellant's own evidence that he was not there, it is established that no one was there to control the movement of the cars or to give the customary signal with the lantern.

II.

ARGUMENT.

So far as the question of assumed risk about which so much is said in the brief of the appellant, is concerned, we submit:

A. There is no such issue in the case. No claim is made either in the pleading or the proof by the defendant in error that the "method" adopted by the company of working on both ends of the train in making it up caused the accident. The claim is that his injury was caused directly from the unusual, unnecessary and improper rate of speed at which the twenty-eight or twenty-nine cars in the rear of the train were driven against the cars, between which Proffit was connecting the air-hose, without any notice or warning and without anyone on the front of the moving cars to control the moving cars or to give signals. This was not the usual manner of handling cars, and, of course, could not be a risk assumed by the defendant in error. The method of having the yard crew work in the rear was not complained of by Proffit. It was the unusual and improper force and speed at which the cars in the rear were driven without being controlled against the part of the train on which he was working. This can be seen by the contentions of the parties respectively.

The declaration alleges as follows:

1st. That appellee was coupling cars at the time and place stated in obedience to the order of the yardmaster.

2nd. That while appellee was performing such duty, "the said defendant company carelessly, negligently and without giving him any notice or warning and without taking any precautions, backed by its yard engine certain cars being the rear portion of said train, with great force and violence and at a great and improper speed into, upon and against the middle part of said train in which middle and front parts of said train were the two cars between which was the said plaintiff engaged as aforesaid and struck the rear part of said middle part of said train with such force and violence that the whole train, including the two cars between which the plaintiff was uniting the air-hose, and the engine and tender of said train standing on said track were knocked, thrown and driven forward a distance of about twenty feet and said plaintiff was

then and thereby, without any fault or negligence on his part, knocked and thrown down, under and between said cars and run over by the said front car of the middle part of said train and his right arm broken," etc., etc.

To this allegation the appellant offered two defenses, as follows:

1st. That it was not guilty of negligence in backing the cars.

2nd. That it had a "method" of handling trains, which came into Glasgow, viz., for the train crew to cut out any cars from the forward part of the train and for the yard crew and yard engine to cut out those from the rear of train; that the appellee as brakeman had been accustomed to assist in that work, and therefore assumed any risk, of the work being done negligently and improperly by the yard crew, who were fellow servants. That such was the contention of the appellant can be seen by the fifth objection to the first and second paragraphs of the charge of the trial judge, where it is stated, on page 45:

> "There could be no recovery by the plaintiff for any injury occasioned by the method of doing the work."

This is also seen by the language on pages 18 and 21 of the appellant's brief. This contention of the appellant is clearly announced on page 28 of said brief, where it is said:

> "The method of conducting the business in this case, that is, of shifting and coupling at both ends of the train at the same time, without any notice and warning to those working at the other end of the train, was open, obvious and known to the plaintiff and he, therefore, assumed the risk of any injury from that source."

Such being its contention, the meaning of the prayer "B," asked for by the appellant, and refused by the trial

court in the form in which it was offered, is readily understood. It reads, as follows:

> "The court instructs the jury that if they believe from the evidence that the *method* adopted by the defendant *in making up the train* at Glasgow was the usual and ordinary method of doing this work, then they are instructed the plaintiff assumed all risks incident to the said method of doing the work even though they believe from the evidence that the said method was the direct and proximate cause of the injury to the plaintiff."

It was virtually a request that the jury be instructed that the mere fact that the appellant was making up its train from both ends released it from liability upon the theory that the appellee assumed any and all risks which might arise from the negligence of any fellow servant or fellow servants in the performance of that work.

In support of this position the appellant cites as appropriate certain decisions of this court, delivered both before and after the passage of the Employer's Liability Act.

We submit that they are cases involving the risk assumed from continuing to use a defective instrument, and do not involve the question as to injuries received from the negligence of a fellow servant in the performance of work.

It cites *Choctaw R. R. Co.* v. *McDade*, 191 U. S. 68, and after stating that in that case this court announces the general rule that the servant does not assume the risks of dangers due to the master's negligence, quotes as follows:

> "This rule is subject to the exception that where a *defect* is known to the employee, or is so patent as to be readily observed by him, he cannot continue to use the *defective apparatus* in the face of

> knowledge and without objection, without assuming the hazard incident to such a situation."

Its quotations from *Texas, etc. R. R.* v. *Harvey*, 228 U. S. 519. and from *Butler* v. *Frazee*, 211 U. S. 259, show that they involved the same questions as to the use of a defective instrument.

It also cites the case of *Gila Valley, etc.*, v. *Hall*, 232 U. S. 94, but does not quote fro mit. In the opinion in that case it is said:

> "An employee assumes the risks of damages normally incident to the occupation in which he voluntarily engages, so far as they are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a *defect* that is attributable to the employer's negligence until the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it."

The appellant then cites *S. A. L. Co.* v. *Horton*, 233 U. S. 492, and claims that it is a "complete and authoritative" announcement of the principle contended for by it, that under the Employer's Liability Act an employee still assumes the risk of the negligent performance of work by a fellow servant. We submit that this court in that case announced the opposite of such contention, and only declared that an employee assumes the risk of dangers arising from knowingly continuing to use a defective instrumentality.

On page 501, the court, after quoting the act, says:

> "This clause has two branches: the one covering the negligence of any of the officers, agents, or employees of the carrier, which has the effect of abolishing in this class of cases the common law rule that exempts the employer from responsibility for the negligence of a fellow employee of the plaintiff; and the other relating to defects and insufficiencies in cars, engines, appliances," etc.

Thus clearly did the court recognize and announce that the act *abolished* the doctrine as to the negligence of a fellow servant. In the face of such a ruling it would be contradictory to contend, that the appellee in this case assumed the risk of the negligent performance by the yardmaster and his crew of its part of the work, merely because such an act of negligence might be committed by the yard crew working at one end of the train, while the plaintiff was working at the other end. Such a contention is asking for the re-establishment of the doctrine of fellow servants, which this court has declared was "abolished" by the act.

In the *Horton case* the risk which was claimed to have been assumed was as to the continued use of a water gauge with knowledge of its defective condition.

When we examine the later decisions of this court, approving the decision in the *Horton case*, we find that they also are as to defective instrumentalities.

In *South. Rwy. Co.* v. *Crockett*, 234 U. S. 725, the question was whether the appellant was liable to a switchman, who with knowledge used a car with improper coupling over a defective track.

In *Toledo, etc., Rd.* v. *Slavin*, 236 U. S. 454, the plaintiff claimed that he, a brakeman, while riding on a car, was hurt by being struck by another car standing on another track, owing to the tracks being too close together.

On the other hand, not only did the court in the *Horton case, supra*, declare that, by reason of the language of the Employer's Liability Act, the doctrine of the so-called as-

sumption of risk from the negligence of a fellow servant had been abolished, but, in all cases, arising under said act so far as we have found, this court has refused to allow a master's exemption from liability for the negligence of a fellow servant upon the old doctrine of being fellow servants.

In *Norf. & West. Rd. Co.* v. *Earnest*, 229 U. S., it appears that the plaintiff was, when injured, piloting an engine through several switches to a main track.

> "The evidence for the plaintiff was to the effect that it was the established custom in the yard for the engineer to await a signal from the pilot before proceeding over a switch, and that the pilot was entitled to rely upon the engineer's conforming to that custom; while the evidence for the defendant was to the effect that by the settled custom the engineer, although required to await a signal before passing over the first switch, was not required to await a signal before passing over the others and that it was incumbent upon the pilot to govern himself accordingly."

Instructions were given that, if it was the custom of the yard for the engineer to proceed without any signal being given him from the first switch or from any other, then it was not negligence in the company for the engineer to proceed without waiting for a signal.

But, notwithstanding that right to proceed without awaiting a signal, the court held, that it was the duty of the engineer to keep a lookout for the pilot so as not to negligently injure him. It said:

> "As before indicated, there was evidence tending to show that it was usual for the pilot to walk between the rails in advance of the locomotive, that the conditions outside the track made it necessary

to do so in the night time, and that all this was known to the engineer. Whether this evidence was true was for the jury to determine; and if it was true, it certainly could not be said as a matter of law that the engineer was in the exercise of ordinary care, which was the controlling standard for him, if he made no effort to see whether the plaintiff was on the track and took no precautions for his protection. Upon that question the court rightly gave the following instruction:

"'If the jury believes from the evidence that it was necessary or usual, within the knowledge of John Drawbond (the engineer), for the plaintiff to walk on, along, or over the tracks of the defendant company in front of the said engine while it was moving, in order to properly perform his duties of piloting said engine out of said yard it was then the duty of the defendant company, through its engineer in charge of said engine, to use reasonable care and caution in the management of said engine, and to keep such a lookout for the plaintiff as an ordinarily prudent and careful man would have done under the circumstances, to avoid running said engine upon or over the plaintiff; and if the said engineer did not exercise such reasonable care and caution, and his failure so to do was the proximate cause of the accident, then they must find for the plaintiff.'"

In *Wright* v. *Yazoo, etc., Ry. Co.*, 197 Fed. 94, the court says on page 97-8:

"As I construe the act, the risk that the employee now assumes is the ordinary dangers incident to his employment, which do not include, since the passage of this act, the assumption of the risk incident to

> the negligence of the carrier's officers, agents or employees."

In that case an engineer was hurt by his engine striking a car protruding from another track too near to the track on which the engine was running.

The case was affirmed in *Yazoo Rd. Co.* v. *Wright,* 235 U. S. 376.

In the same volume with the *Horton case, supra,* is found the case of *South. Rwy. Co.* v. *Gadd,* 233 U. S. 572, which in some respects resembles the case at bar.

It appears in that case that in its general charge, the court had instructed the jury that the plaintiff was entitled to recover if they believed the testimony of the plaintiff which disclosed an unusual and reckless movement of the engine by the engineer after he had directed the fireman to descend from the engine to ascertain whether there was a defect in its mechanism. Coming then to consider special charges asked by the respective parties, the court gave a charge requested by the plaintiff as follows:

> "If you believe from the evidence that the plaintiff was directed by the Engineer Hunter to get off the engine and examine the engine for defects, then while said plaintiff was obeying the direction of Hunter, it was Hunter's duty to look for plaintiff and not move the engine until he knew that plaintiff was in a position of safety."

The defendant objected to the charge and stated orally that it left out of question the doctrine of assumed risk.

The trial court replied:

> "I understand that the doctrine of assumed risk is abolished by the Employer's Liability Act, in so far as it relates to cases wherein the servant is in-

jured because of the negligence of any of the officers, agents or employees," etc.

The court said:

> "From this statement it is evident that no charge whatever was given by the court concerning the assumption of risk and hence that no exception was or could have been taken to any such charge, and that the exception which was reserved concerned the special charge as to the conduct of the engineer and the portion of the general charge concerning liability if the testimony of the plaintiff as to the negligence of the engineer was believed, the exception as to the latter having been placed on the ground that the court had been silent as to assumption of risk. And it is equally clear that this view is not affected by taking into account the reply of the court to the comment of counsel. We say this because while the reply echoed *the counsel's mistaken use of the words 'assumed risk'* by the qualification which affixed to the words, it *clearly conveyed that* as the matters to which the excepted clause related *purely concerned the common law principle of fellow servant* and contributory negligence, *they were* controlled by the provisions of the statute."

In *McGovern* v. *Phila., etc., R. R.*, 235 U. S., 389, it appears that the deceased was clearing snow from the tracks of the defendant. The place in which he was working was regarded as a dangerous place, because of trains frequently passing. The company claimed he assumed the risk of not being warned by foreman or subforeman.

The court held that it could not say that the trial judge erred in refusing to charge, that the deceased assumed the risk of the situation under the circumstances.

In *N. Y. Cen., etc., R. R. Co.* v. *Carr*, 238 U. S. 260, it is stated:

> "It was the duty of one brakeman, O'Brien, to uncouple the air-hose from the engine, and for the other (Carr) to set the handbrakes in order to prevent the two cars from rolling down upon the main track. O'Brien having failed to open the gauge to the stopcock, suddenly and negligently broke the air-hose. The result was that the sudden escape of air—applied only in cases of emergency—violently turned the wheel handle attached to the brake which Carr at the time was attempting to set. The wrench threw Carr to the ground, and for the injuries thus suffered he brought suit in a State court. If the case was to be governed by the law of New York he was not entitled to recover, since the injury was due to the negligence of O'Brien, a fellow servant."

The language of the court shows that it recognized that under the Employer's Liability Act, the rule, as to the non-liability of the master for the negligence of a fellow servant, did not apply, although the act of negligence was committed during the performance of customary work.

In *Central, etc,. R. R.* v. *White*, 238 U. S. 507, the plaintiff was engineer on a freight train running ahead of another train. The latter train had an engine which leaked and allowed steam to escape and obstructed the view of the engineer of the hindermost train, and who had a clearance card for the track.

Held:

> "But there was not only no request to charge on that (assumption of risk) subject, but there is no evidence that White knew of the negligence of the agent in giving a 'clearance card,' or of the leaking

> cylinder which obscured the vision of the engineer. He did not assume the risk arising from unknown defects in engines, machinery or appliances, while the statute abolishes the fellow servant rule."

In the light of the above decisions we submit:

1st. That the contention of the appellant that the appellee assumed any risk from the possible negligence of any of the yard crew in doing their part of the work cannot be sustained.

2nd. That that being true the appellant was not entitled to have the jury charged as set forth in its prayer B.

The evidence shows these cars in the rear were turned loose, being cut off from the engine on a down grade, without anyone on the front of the cars, as is usual, to control them; but whether they were cut off from the engine or not is an immaterial matter. They were driven with *unusual* and terrific force against the other cars standing on the track. This is the claim made by the defendant in error, and not the mere fact that the train was being made up and worked on in front and rear. The speed of the cars shoved in and the cause which produced this great and *unusual* speed, surely cannot be considered an assumed risk. Indeed, no such claim is made by appellant. The fact, that the train was being worked on at both ends, is what the appellant claims is the assumed risk; and we submit that that neither caused, nor was claimed by appellee to have caused, the accident. It is an issue not involved in this case and which existed alone in the imagination of the railroad company.

The action of the court below, in refusing and modifying the instruction "B" (p. 46 of the record) offered by the company was not only not an error of which it could complain, but the giving of the instruction even in the modified form in the court's instruction "B" (p. 47 of record) was an error of which the appellee could have com-

plained, had there been a verdict and judgment against him.

It is evident that the question at issue was not, as contended by the plaintiff in error, whether it was customary for a manifest train to be made up by the train crew shifting or cutting out cars at one end of the train, while the yard crew did the same work at the other end. The plaintiff in error seems to have regarded, and still regards, that as the main question, as can be seen by the prayers offered by it in the lower court and by its brief in this court. It seems to hold that, if such custom be established, it was entitled to a verdict, either by positive direction, or by conclusions to be drawn by the jury from an appropriate charge of the court and the evidence.

The defendant in error submits, on the other hand, that that question was an immaterial one; that the custom might be conceded as established, yet it could afford no valid defense to the plaintiff in error. For it must be remembered that the witnesses for the plaintiff in error established the fact, that a part of the customary course of procedure, in so managing such a train, was that a brakesman should ride on the head car with a lantern; that when the head car approached near to the car to which it was to be coupled, it was the duty of this brakesman to get down upon the ground and by his lantern wave down the engineer on the engine backing the cars "to slow up" (p. 19); "that he would ride back to hold them up so that they would couple up easily," so as not to knock the cars into each other with violence.

The evidence shows that that customary course of procedure was not followed. All the evidence shows that the rear cars came back with unusual force and violence. *The only question was as to the degree of violence.*

Taylor said that he only knew what the brakesman told him, that he told him that the cars were knocked about six feet (p. 20). The brakesman, Jackson said that the cars

were knocked about six or eight feet (p. 25). Both of these were witnesses for the appellant.

The testimony of the brakesman, McCoy cannot be regarded as of any weight, for he testified that he was about twenty-seven cars from the point of impact, as he was on the second car from the yard engine. He, however, testified that:

> "He thought the cars were driven only between three and five feet; that he didn't make any examination, and that he was mere guesswork as to how far it was," (p. 22).

Even if we assumed the testimony of Jackson to be true, yet there can be no doubt, but that the customary course of procedure was not followed, in driving the cars back with such force and violence, as to knock back seven cars, an engine and tender, a distance of six or eight feet, as testified by witnesses for the company, who were at a distance from the point of collision and guessed at it, or twenty feet by witnesses for Proffitt, who were at the spot and measured and reported the distance at the time to the railroad company (when the engine brake was on). *Res ipsa loquitur.*

When, along with this evidence of the plaintiff in error, we notice the statement of Perkins and Toone, employees of the plaintiff in error, that the cars, and engine, and tender, notwithstanding the engine brake was on, were knocked twenty feet and the testimony of Carter that the cars were not shoved by the yard engine, but were "kicked" along the track for the purpose of making the coupling—that is, that they were cut loose from the yard engine, and, unattended by Jackson, allowed to roll down the grade, until they butted into the stationary cars—then we see, not only that the customary course of procedure was not followed, but that the movement of the cars was done in an *unusual* and negligent manner, and that the impact was *unusual* and of great violence, and clearly caused the injury.

J. A. CAPELL, another witness for the plaintiff in error, testified:

> "In shoving in a cut of cars you come in so you can stop them with the engine, but kicking them in, if you started to do that, they go down * * * In kicking cars a man rides on the foremost car to control it with handbrakes" (p. 38).

Here, even the custom of having a brakesman on the cars to handle the handbrakes, when the cars were "kicked" is not claimed to have been followed. Hence, we repeat, that the question before the jury was not, as to the custom about using on different ends of a manifest train, the train crew and the yard crew, but that the cars, while being shifted, *were not managed in* the customary way, but were negligently "kicked" along, and driven with great and unusual force and violence against those upon which the defendant in error was at work.

Had the cars been shoved by the yard engine, until they had approached close to the stationary cars, and had Jackson then gotten down upon the ground and with his lantern have waved down the engineer on the yard engine to go slow, so that the cars would have approached with about enough momentum to make the coupling, two results would have occurred:

> 1st. The defendant in error would have seen Jackson's lantern and would thereby have been given notice of the approach of cars.

> 2nd. The impact would have scarcely done more than to take up the slack between the cars by driving them together and to have jarred the engine, and would not have moved a sufficient distance for the wheels of the stationary car to run over him, if it had moved the standing cars at all, which were attached to the engine on which the brake was set.

> Perkins, the fireman on the engine, testified that it depended on the way the (yard) engine was handled whether there was a jar even (p. 14). Thus it appears that there need not have been a jar, let alone a moving forward of the engine and cars any distance at all.

By pursuing the unusual and negligent course above shown, two results did happen:

> 1st. The defendant in error was deprived of all opportunity to be notified of the approach of the cars.
>
> 2nd. The cars were driven, by reason of the force and violence of the impact, a sufficient distance to run over him after he was knocked down, towards the train engine.

We submit that in the light of these facts the trial judge committed no error in his charge or in refusing to conform it to the prayers of the plaintiff in error.

B. The instruction asked for by the railroad company on this question was as follows:

> "'B.' The court instructs the jury that if they believe from the evidence that the method adopted by the defendant in making up the train at Gladstone was the usual and ordinary method of doing this work then they are instructed the plaintiff assumed all the risks incident to the said method of doing the work and they cannot find a verdict for the plaintiff because of any injury received on account of said method of doing the work even though they believe from the evidence that the said method was the direct and proximate cause of the injury to the plaintiff."

This was modified and given by the court as follows:

> "'B.' The court instructs the jury that the defendant company has the right to adopt reasonable rules and regulations for the conduct and method of handling its train of cars on its yards, and of making up its trains for their departure therefrom, and if they believe from the evidence that the custom prevailed in the Gladstone yard at the time of the accident on which the occurrence happened of making up the train from both ends at the same time, that is by working the train engine and crew at the forward end and the yard engine and crew at the rear end, and that such method was one that reasonably prudent and careful men would have adopted in the conduct of its business, then they are instructed that the plaintiff assumed the risks reasonably and usually incident to and arising from such method of making up trains; and they cannot find a verdict for the plaintiff because of any injury received solely on account of said method of making up the train; although they may believe from the evidence that the method adopted was the direct and proximate cause of the injury to the plaintiff."

Not only was the instruction given by the court all and more than all that the company had a right to ask, but the instruction asked by the company was clearly erroneous because it left out of consideration altogether, the assurance which was not only plainly implied but was expressed, that there was no danger to be apprehended from work on the rear of the train when the plaintiff in error returned after carrying out the order to put three cars on the side track, by the directions and statement given and made to him by the yardmaster under whose orders he was, which were as follows (p. 9):

"The yardmaster told me to throw out two, three and four (Nos. of cars) and by that time we would be ready to go back and couple up, and we would be ready to go."

If this was not an assurance that by the time he returned from putting the three cars on side track that it would be safe to do his work in coupling and fixing the air-hose on the front cars on the main track and that there was and would be no movement or work which was dangerous to be done at that time by the yard crew under Taylor's control, it was surely such a statement as was well calculated to produce such an impression on Proffitt and to lull him into security. At any rate this matter should have been left to the jury; and the instruction asked for by the railroad company should have been so modified as to present this view. This might have been done by inserting at the proper place in, or by adding to, this instruction the words, "unless the jury believe from the evidence that the plaintiff was reasononably led to believe from the directions and statement of the Yardmaster Taylor, that no such work would be being done at the time he was to make the coupling of the cars and the air-hose on the main track." Proffitt had at least the right to believe that no such movement of cars in the rear would be made at all, or if made, that it would be completed by the time he got back from moving the three cars on the side track, having been told, that as soon as he got back, "they would be ready to go." The omission of this view of the case in instruction "B" would of itself have been enough to require and justify the court in rejecting this instruction.

But we again call attention to the fact that no such question is here at issue. It is an issue presented by the plaintiff in error, but nowhere found in the pleadings. The declaration nowhere alleges that the custom of the two crews working on different parts of the train was an act

of negligence, nor that the custom of moving the cars together at the usual and reasonable speed was an act of negligence. The declaration complained of the cars being "carelessly, negligently and without giving any notice, or warning, and without taking any precautions, backed by its engines * * * with great force and violence and at a great and improper speed," etc., etc. That was the question submitted to the jury together with the question whether the defendant in error was injured by such negligence. That negligence was in moving the cars at such improper speed and violence as to have knocked the cars six or eight feet, as testified to by the witnesses for the plaintiff in error, or twenty feet as testified to by the witnesses for the defendant in error.

Had the cars been brought back in the usual way at the usual speed and force with a man on the front car to control the speed it would have perhaps jarred the cars; and even if the usual force was sufficient to have moved the cars and the engine with its brake on a distance of a foot, the defendant in error would not have run over. But when they were knocked six or eight feet as testified to by the company, or twenty feet, as testified to by the appellant's witnesses, who measured the distance at the time and reported it to the company, then, when he was knocked down, the car next to him could easily run over him, and did do so.

Instruction "B," both as offered by the appellant and modified and given by the court, is erroneous as to appellee, because it omits all reference to the knowledge of appellee of the custom of working on the rear end of the train in such manner as was done, the night of the accident. In fact appellee denied that he knew of a custom of working on both ends of manifest trains, the kind he was on, on this occasion was so usual as to put him on notice at the time he was hurt and though he did finally in answer to a question by the company's counsel, "Is it not customary for the yard engine to work on the rear end of a manifest train and the road engine on the other end?" by saying "yes,"

still it is evident that he was not expecting this to be done then. He certainly had no knowledge of the unusual way the work was then being done. Perkins, the railroad company's engineer, had testified (p. 14) in reply to a similar question that, "he had seen cars at both ends of the train, but that some trains did not have to be switched, especially coal trains and manifest trains." Cunningham, a witness for the company says (p. 28) "very often on manifest trains they did not have to take cars out." Ballou, a witness for the company (p. 39) says, "very often it is the case when a manifest train comes in, there is no work for the yard engine to do." Surely the question of Proffitt's knowledge of such a custom should have been left to the jury.

It is manifest that the first and second paragraphs of the court's charge put the plaintiff, in order for him to recover, the burden of proving that instead of a custom being followed, an "unusual and excessive" or an "improper and unusual" course was pursued. (See pp. 41-42, where the court charged:

> "1. If the jury believe from the evidence that it was necessary or usual within the knowledge of the yardmaster, Taylor, for the plaintiff, when attempting in obedience to the order of said yardmaster in the night time to couple or connect the air-hose upon two cars of the train of the defendant to place himself in part between said cars, so that he would be unable to see or ascertain the approach of the other car or cars of said train, which were being moved, in order that they might be attached to one of said two cars, then it was the duty of the said defendant by and through its said yardmaster to exercise reasonable and ordinary care to prevent, without due notice being given to the plaintiff, the said cars, so to be attached from being driven or moved at an unusual and excessive speed and with great and un-

usual violence against one of the said cars upon which the plaintiff was doing the coupling as aforesaid, so as to cause the last mentioned car to strike the plaintiff while so at work, to knock or shove him down and run over him, and if the said yardmaster did not exercise such reasonable and ordinary care, and his failure so to do was the proximate cause of the accident, then they must find for the plaintiff.

"2. If the jury believe from the evidnce that the plaintiff while at work upon certain cars of the defendant under the order of the yardmaster, was injured by reason of other of its cars being driven or moved through the negligence of any of its employees, managing or at work on the last mentioned cars, without any notice or warning to the plaintiff and with improper and unusual force or speed against the car upon which the plaintiff was at work, that is such negligence on the part of the defendant as will make it liable to the plaintiff if such negligence was the proximate cause of the accident."

The jury under these directions must have found that the cars were driven together with "*unusual*" and excessive speed, which negatives the observance of any custom. An "unusual" act cannot constitute a custom.

III.

Instruction "B" (and its modification by the court) not only should not have been given because no such issue was made by the pleadings or brief; but it is clear from the record, that the verdict of the jury, which under the charge of the court must have found that the cars were driven together at an *unusual* and "excessive speed" and "with great and *unusual* violence," could not have been influenced by any custom of the company. The jury found that the

act of negligence which made the company responsible was "unusual," so they must have found there was no such custom.

The Supreme Court of Illinois in the case of *Decatur Cereal Mill Co.* v. *Gogerty*, 180 Ill., p. 197, held that,

> "Where a requested instruction should not have been given because there was no evidence to warrant it, the judgment will not be reversed because it was improperly modified."

The modification of the improper instruction offered by appellant is what it complains of.

We submit that the instruction asked for, being manifestly improper, disposes of all question that might arise upon its modification. The court having already charged the jury expressly that, in order to find a verdict for the plaintiff, they must believe from the evidence that the approaching cut of cars was "being driven or moved at an *unusual* and excessive speed and with great and *unusual* violence, it is respectfully submitted, that the verdict, finding, as in effect it did, that the cut of cars were so driven necessarily found the issue which the railroad company desired left to the jury by its instruction "B" against it. It is not perceived then how the rejection of this instruction could possibly have influenced the verdict. (See 122 Ill. App. 290, *Harris* v. *Gaunt*.

> "Notwithstanding the instructions given may be subjected to criticism a verdict will not be disturbed on appeal where it appears that substantial justice has been done and that the instructions on the whole fairly presented the law of the case to the jury."

In *Seaboard, etc.* v. *Padgett*, 236 U. S., 668, it is said:

"Whether the instructions could have produced misconception in the minds of the jury is not to be ascertained by merely considering isolated statements, but by taking into view all the instructions given and the tendencies of the proof in the case to which they could possibly be applied."

91 N. E. 41, *Buknese* v. *Brandi* (Indiana, March, 1912):

"A judgment will not be reversed because of an erroneous instruction unless the court is satisfied that the jury was thereby misled."

Larson v. *C. & N. W. R. R. Co.*, 131 N. W. 201:

"Where it appears from the whole record that an alleged misleading charge could not reasonably have influenced the verdict to the injury of the complaining party a mistrial on that ground should not be granted."

168 Ill. App., 450, *Devine* v. *Chicago, etc., R. R.:*

"Where it is apparent that the jury has not been misled, and the result is substantially correct, technical errors do not afford sufficient ground to reverse a case."

62 So. 18, *McCreary* v. *Ala. & Great So. R. R.:*

"The giving of misleading charges will not be reversible error unless the appellate court is satisfied that the jury was misled thereby."

Richardson v. *Wood* (Me.), 93 A. 863 (April, 1915):

> "Exceptions to instructions will be overruled where on examination of the charge appearing in the record, the court is unable to find that the party complaining was injured thereby."

We respectfully submit with respect to these decisions, not only does it appear from the record here that the jury has expressly decided, that no such custom, as the act complained of by the appellee, was in existence, having decided under the instructions that the act was *"unusual,"* but that no such custom as that set up by appellant was complained of or relied on by the appellee in either its pleading or its proof and that the instructions asked by appellant were therefore upon an issue not in existence; and that the verdict of the jury, has in fact found even this moot issue against the railroad company, and that even if the modification of instruction "B" as given by the court was wrong, which we insist is not the case, it is an error which should in no wise affect the validity of the verdict and decision of the courts below in this case.

IV.

While we by no means concede that instruction "B" as modified by the court contained error of which the appellant can complain even if such an issue as it was insisting on had been before the jury; and was not in fact, sufficiently submitted by the charge of the court and necessarily decided adversely to the appellant by the jury. So confident are we that the decision of the Circuit Court of Appeals was right where it says that this question presented by instruction "B" was not in issue in this case either by the pleading or proof and that the true question in issue was submitted to the jury with proper instructions (page 61 of record); that we will not argue this matter further in this brief, to-wit, as to the correctness of the modification of instruction "B" by the court below. Should, however,

(which we do not apprehend), the court think it necessary to pass on whether a negligent custom of the servants of a railroad company in doing this work can constitute an assumption of risk we would respectfully refer to the brief of appellant in the case of *Jacobs* v. *Southern Railway Co.*, No. 326, pending on the docket of this court, which will doubtless be argued before the question at bar will be decided, and which discusses fully this question.

V.

Neither the motion to set aside the verdict in the case at bar because it is contrary to the law and evidence or because it is excessive can be considered by this court. Such questions are left to the discretion of the trial court and are not reviewable by and in the courts of the United States. 143 U. S., pp. 61-75, *Erie R. R. Co.* v. *Minter:*

> "It is not the province of this court to determine whether a verdict is excessive."

Page 75:

> "We are confined to the consideration of exception taken at the trial to the admission and rejection of evidence and to the charge of the court and its refusal to charge. We have no concern with questions of fact or the weight to be given to the evidence which was properly admitted."

See 51 Fed. Rep. 562-580, *North Pacific R. R. Co.* v. *Charless*, Syl. 7:

> "The correction of an excessive verdict is a question for the trial court on a motion for a new trial, the granting or refusing of which will not be reviewed by the Federal appellate courts."

Hughes' Fed. Procedure (2nd ed., 1913), sec. 148, p. 411:

> "The granting or refusing of a new trial in the Federal courts is a matter of discretion and cannot be the subject of a bill of exceptions."

See, also, 97 U. S. 581, *Newcomb* v. *Wood;* 150 U. S. 57; 111 Fed. 591, *South Penn. Oil Co.* v. *Lathshaw;* 200 Fed. 568, *Victor, etc., Co.* v. *Peccarich* (1913).

It seems from these decisions that the only bills of exception that can be considered by this court in the case at bar are the bills of exception taken to the instructions of the court below, there being no objections to the admission or exclusion of evidence.

VI.

Are these bills as shown by the record sufficient? There are only two of these bills of exception, viz: Bill of exceptions No. 2 on pp. 43-45 inclusive, of the record, which excepts to three instructions given by the court, and bill of exceptions No. 3, on pp. 46-48 inclusive, of the record, which excepts to the refusal and modification of and by the court of the company's instructions and embraces nine instructions and excepts to the action of the court with reference to five of them.

2 Vol. Bates on Federal Procedure, sec. 114-115, 1908, edition, p. 805, says:

> "It is the duty of the exceptant to call the attention of the court to the specific propositions of law that are deemed erroneous and where they are excepted to in mass, the exception will be overruled if any one of the propositions be correct.
>
> "The undoubted rule is that each proposition of law deemed erroneous should be made, the subject of a distinct and separate exception and embodied

> in a separate bill of exceptions, sufficient in itself to present to the appellate court upon writ of error, the single point of law."

Hughes Fed. Procedure (2nd ed.), 1913, (as to bills of exceptions), p. 409-410:

> "It is the duty of the exceptant to point out the special portions of the charge which he considers objectionable; so also as to instructions involving more than one proposition; he must indicate the special parts of the instruction to which he objects otherwise his exception will fail; and he must take a separate exception to each instruction or to each error of law involved in the instruction, and make each one the subject of a separate assignment of errors.
>
> "If a series of instructions is asked and the court refuses them and a bill of exception is taken to the action of the court in refusing them the exception fails, if any of those instructions is wrong."

This rule prevails in many of the State courts as well as in the Federal courts. See 43 Wisconsin 305, *Dean* v. *Chicago & N. W. Ry. Co.*, section 3.

An instruction stated the rule of damages in other respects correctly and added that interest might be allowed from the date of the injury, an exception to said instruction and to each and every part thereof, "held not sufficiently specific to raise the question whether the time for which interest might be allowed was correctly stated."

Page 310:

> "Though the insufficiency of the exception was not raised by counsel, the record showed it and the court decided it was fatal."

34 Utah, p. 223, *Pennington* v. *Redsman, etc. Co.* (1908), syl. 3:

> "An exception to an entire instruction as a whole was unavailable, where the excepting party conceded that a portion of the instruction was proper."

114 N. W. 499, *Kerstein* v. *Weichman* (1908), Wisconsin:

> "A single exception to a provision of a charge containing independent propositions, some of which are good is too general and will be disregarded on appeal."

104 Pacific 218, *Ryan* v. *Cushman, etc., Co.* (1910), syl. 4 (Utah, 1909):

> "When an instruction contains several propositions some of which are sound an exception to it as a whole will not be considered."

93 N. E. 562, *Chicago, etc. Co.* v. *Coon*, 48 Indiana App. Ct. Rep., 675 and 687-9, (1911):

> "A joint objection to several instructions cannot be sustained where some of them are correct."

Court says page 566:

> "It is well settled by the decisions of this and the Supreme Court that unless the instructions jointly alleged to be erroneous are bad, the contention that one or some of them are bad is not available."

208 Mass. 233, *Bartow* v. *Parsons, etc. Co.* (1911):

> "Where at a trial an exception was taken to about ten lines of the judge's charge and in this court the

excepting party objected to only two of the ten lines, which appeared to be somewhat obscure, although susceptible to a construction that made the instruction correct, and it did not appear in the bill of exceptions that the trial judge's attention was called at the close of the charge to the objection to the specific two lines, the exception cannot be sustained."

Court says, page 236:

"This part of the charge is somewhat obscure, but the defendant did not call this portion of it to the attention of the presiding judge."

64 South. 98, *Gilley* v. *Dunman* (Ala., Dec. 4, 1913), syl. 13:

"An exception to an instruction which included directions which were plainly correct properly overruled. See, also, 5 Denio (N. Y.), 218, *Lansing* v. *Wisconsin.*

170 U. S., p. 615, *Holloway* v. *Dunham:*

One general exception to thirteen different instructions cannot be considered sufficient when each instruction consists of different propositions of law and fact, and many of them are clearly correct.

The exception was "to the giving of which instructions and each of them," p. 619.

The opinion says, page 620:

"After the judge has given a long charge to the jury consisting of many propositions of law and fact involved in the trial, a general exception noted at the end of the charge to each proposition separately of law and fact announced therein is not sufficient

> if any proposition of law contained in the charge is correct."

The recent publication of Ruling Case Law, which we understand is one of the most reliable authorities on matters therein treated of, Vol. 2, "Appeal and Error," sec. 69, says:

> "A single exception cannot be taken successfully to a number of rulings if any one of the rulings excepted to collectively is correct, the rule being that where an exception covers several propositions, it is a general one, and is not available if any one of them is correct. This rule is chiefly exemplified when a general exception to instructions given, which contain separate and distinct propositions, is taken and the exception is unavailing on appeal if any part of the instruction was correct. The same rule applies, where the exception, is to the refusal to give instructions asked for *en masse*, one of them being faulty?

It would seem from these references that the two bills of exceptions, one of which refers to three instructions and the other to nine, are first, for this reason alone improper. Each instruction should have been the subject of a separate exception and that if any one of these instructions objected to in this is good, the objections in such bills of exception will be disregarded.

Second. That independently of this proposition, if any one instruction which was objected to contained propositions some of which were sound, this of itself renders such objections and the exception to it invalid.

Take for example the instruction on the measure of damages, page 44 of the record, which gives a number of separate matters which may be considered by the jury; not only is this exception combined with objections to all the other instructions, but in dealing with this instruction, the only

objection specified to it in the bill is an objection to it *copying it word for word*, even to the statement in it; that the verdict should "in no event exceed the amount laid in declaration, being $20,000.00." It is perfectly evident that this exception even it had been made in and by a single and separate bill, failed to specify and point out so as to specify and call the attention of the trial court to what was the real point of objection of the railroad company.

In *Phoenix Railway Co.* v. *Landis*, 231 U. S. 578, it is said:

> "An instruction that the jury might consider the income and earning capacity of deceased, his business capacity, experience, health conditions, energy and perseverance during his probable expectancy of life, will not be held to be too general in the absence of a suitable request of the defendant for an instruction with greater particularity."

In the case from 208 Massachusetts, before mentioned, the exceptant took an exception to about ten lines of the judge's charge, about the same number as in seventh instruction here, and only objected on the trial on the appeal to two lines, which the court says, were somewhat obscure (and were of course, for that reason objectionable). The court however refused to consider this bill of exceptions on the ground that the defendant did not call the court's attention to this particular part of it.

It is clear that the record here does not show that the appellant "called the attention of the court to the specific propositions of law that are deemed erroneous," as stated in Bates on Federal Procedure; or to the special parts of the instruction to which he objects, "and that his exception will fail" as stated in Hughes Federal Procedure.

We submit that the course of appellant with regard to this seventh instruction strongly illustrates the reason as well as the wisdom of the rule adopted by the United States courts and other courts and laid down in text-writers with

reference to the necessity of the bills of exception calling special attention of the court below to its specific objection. The object of this rule is to enable the court to modify its instructions if deemed proper, and also to enable the counsel on the other side where it is proper to do, to meet the objection by amendment or in other ways.

The argument is made for the first time in an appellate court that this instruction was erroneous because one of the elements of damage, "Any physical pain the plaintiff will suffer in the future," as stated in the instruction, allowed the jury to consider pain not arising from the injury. This is exceedingly far fetched and fanciful, the context showing clearly that this expression as well as others in the instruction referred to suffering and pain arising from the injury.

We submit that not only is there no merit in this point, but that if it had been made at the trial it could have been easily remedied and this discussion avoided by the mere insertion of a word or two.

The same may be said of the argument that the declaration did not charge future pain. The fact that evidence was allowed without objection showing that the appellee "suffered from his arm all the time" and that it was worse in bad, rainy weather than at other times," that this was the case at the trial, fifteen months after the accident (p. 10-11 of the record) not only showed sufficient evidence to go to the jury on this point, but waived any objection to the form of declaration, if indeed, it ever could have availed anything. The bill of exceptions also fails to show that any such specific objection was specifically made to this part of the instruction. Had it been an amendment at bar, had it been deemed necessary, would have been allowed to meet this objection, or the instruction could have been changed. There is, we submit, no force in this objection anyway, but if there had been, it would have been easily obviated had it been brought to the attention of the trial court.

Upon this point we call attention of the court to the decision of the trial court in *Pederson* v. *Railroad Co.*, 229 U. S. In that case it will appear that no allegation was made in the declaration as to future suffering or future losses (page in that case 405 of record). Yet, though the charge of the court on page 67 uses this language "he is also entitled to a reasonable allowance for whatever pain or suffering he had undergone already, or may be called upon to undergo in the future due to this injury * * *" the court told the jury that they should deal with this subject as reasonable, sensible men, and gives a broad discretion in that matter. This court found no fault with this ruling of the court below.

The same may be said of that portion of this instruction which informs the jury that they may consider his incapacity "from doing any other work." He was asked and answered about this matter without objection. No specific objection on any such ground as is now urged in appellee's brief appears to have been called to the attention of the court by the bill of exceptions, and leaving out the shadowy and unsubstantial objection, now for the first time urged, we can say in the language of the authorities, the objection thus made and presented by the record is "unavailable."

We have taken this bill of exception as a sample which illustrates the wisdom of the rule discussed, which we submit, applies to all of the instructions.

In conclusion we submit, that the record shows that the case was fairly tried upon fair instructions before the trial court and jury, and a verdict and judgment rendered for a permanent and serious disability, the loss of a working man's right arm, amputated close to the shoulder. The pecuniary loss he would suffer taking the lowest amount he received per month as a measure, $60.00, was six per cent on $12,000.00 and taking any life expectancy (fifteen months had already passed) would have amounted to as much. While if $90.00 the largest amount he received, be

taken as the measure it would have amounted to much more. Thus without considering the pain and suffering he underwent and will undergo, the verdict could not be regarded as an excessive one, even if that matter could be considered by this court. The verdict of the jury and judgment of the trial court and Circuit Court of Appeals should not be interfered with.

In *St. Louis, etc., Rd.* v. *Craft*, 237 U. S. 648, it is said:

> "The amount of a verdict for damages for suffering, although apparently large, in this case $5,000 for pain endured during a period of thirty minutes, involves only questions of fact and is not reviewable here under section 237, Judicial Code. The power, and with it the duty and responsibility, of dealing with such questions rests upon the courts below."

We submit:

1st. That the case was properly and fairly submitted to the jury, as they were told that the plaintiff could not recover unless they believed from the preponderance of the evidence that through the negligence of any of the appellant's employees, the cars were driven or moved back against the car on which the plaintiff was at work without notice or warning to him with improper and *unsual* force or speed, and that such negligence was the proximate cause of the injury. That the burden of proof was upon the plaintiff.

2nd. That the above conditions were impressed upon the jury by repetition in several of the paragraphs of the charge.

3rd. That such conditions necessarily required the jury to believe, that the plaintiff was not injured merely by the handling of the rear part of the train by the yard crew and the front part by the train crew, and, therefore, the appellant was not injured by the refusal of the court to give the prayer *B* asked for by the appellant.

4th. That the appellant was not entitled to have prayer *B* given, as it admits that by its language it meant, as above shown, that the plaintiff was not entitled to recover because he had assumed the risk of being injured by the negligence of any of the yard crew.

5th. The record clearly shows by an overwhelming preponderance of the evidence that the plaintiff was injured because of the negligence of the yard crew in handling the rear part of the train, in "kicking" in the cars with *great and unusual force and momentum* without any one riding on the cars to control them and without giving the plaintiff any notice of such movement of the cars.

We ask that the judgments of the lower courts be affirmed.

In *Seaboard Air Line* v. *Moore*, 228 U. S. 433-435, this court said:

> "As 'we find nothing giving rise to a clear conviction on our part that error has resulted from the action of the courts below,' the judgment of the Circuit Court of Appeals must be affirmed."

Respectfully submitted,

C. V. MEREDITH,
HILL CARTER,
Defendant in Error.

February 9, 1916.

CHESAPEAKE & OHIO RAILWAY COMPANY *v.* PROFFITT.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 273. Argued March 10, 1916.—Decided June 5, 1916.

The danger to a brakeman at work in switching at one end of a "manifest" train, arising from switching operations conducted by another crew at the other end, is not among the ordinary risks of a brakeman's employment; and, in the absence of notice or knowledge, such brakeman cannot be held to have assumed it.

To subject an employee without warning to unusual danger, not normally incident to the employment, is itself an act of negligence.

While an employee assumes risks and dangers ordinarily incident to the employment, so far as they are not attributable to the negligence of the employer or those for whom the latter is responsible, the employee has a right to assume that the employer has exercised proper care to provide a safe place and method of, work.

An employee is not to be regarded as having assumed a risk attributable to the employer's negligence until he becomes aware of it, unless it is so plainly observable that he must be presumed to have knowledge of it.

An employee is not obliged to exercise care to discover dangers resulting from the employer's negligence and which are not ordinarily incident to the employment.

Even if an employee knows and assumes the risk of an inherently dangerous method of work, he does not assume the increased risk attributable, not to such method, but to negligence in pursuing it.

In the absence of knowledge of a custom of the employer in making up trains, a brakeman is not bound by such a custom, unless it is one that a reasonably careful employer would adopt.

A request to charge that the jury find for defendant if the usual method of doing work was pursued irrespective of the question of negligence of other employees was, in this case, properly modified by the court to the effect that the method adopted must be one that reasonably prudent men would adopt and that the injured employee only assumed the risks reasonably and usually incident to such method.

218 Fed. Rep. 23, affirmed.

THE facts, which involve the validity of a judgment for damages for personal injuries in an action under the Employers' Liability Act, are stated in the opinion.

Mr. Walter Leake and *Mr. David H. Leake*, with whom *Mr. Henry Taylor, Jr.*, was on the brief, for plaintiff in error.

Mr. C. V. Meredith and *Mr. Hill Carter* for defendant in error.

MR. JUSTICE PITNEY delivered the opinion of the court.

This was an action brought in the United States District Court under the Federal Employers' Liability Act of April 22, 1908 (c. 149, 35 Stat. 65).

Plaintiff was a brakeman in defendant's employ and, during the night of July 2, 1912, was called for duty at Gladstone, Virginia, to take his place as head brakeman on a fast interstate freight train, known as a "manifest train," comprising about forty cars, which had just come into the division terminal yard at Gladstone and was about to be taken forward. He got upon the road engine and this was attached to the train, plaintiff making the coupling. Just after this he met the yardmaster, who had charge of all the work done in the yard, whose orders plaintiff was bound to obey, and who told plaintiff, according to his testimony, to "cut out three cars at the head end of the train [numbers 2, 3 and 4] and switch them off on a side track and come back and couple up, and they would be ready to go." Plaintiff proceeded with the road engine and crew to take out the three cars, returned to the main track with the engine and car number one, coupled the latter to the forward end of the train, and was in the act of coupling up the air hose, an operation that required him to step between the rails. While

he was in this position, a collision took place, caused by the acts of the yard crew, who (unknown to plaintiff) under orders of the yardmaster, and with the aid of the yard engine, were engaged in switching cars at the rear end of the train, and who, negligently, as the jury doubtless found, drove a cut of twenty-nine cars into the standing cars (about eight in number) with undue violence. According to the testimony of the road engineer and fireman the jar of the impact was such that, although their engine was standing, with its independent brakes set, it was thrown forward twenty feet along the track. Naturally plaintiff was knocked down and run over, and he sustained serious personal injuries, including the loss of an arm.

In view of the character of the question that is to be passed upon, a somewhat particular recital of the evidence is necessary. There was testimony that when a manifest train came into a terminal yard such as Gladstone, destined to points further along the line, the engine and caboose were changed and sometimes cars were taken out and others brought into the train; and that in order to save time it was customary to have such shifting operations, when necessary, done at both ends of the train, the road engine and road crew operating at the front, the yard engine and yard crew at the rear. Whether plaintiff knew of this custom was, under the evidence, open to dispute. He at one time denied that he knew it was customary for both ends of a manifest train to be "worked" at the same time; and while this was afterwards qualified, it appears not to have been withdrawn. He admitted that it was customary to follow the instructions of the yardmaster, but denied that on this occasion the yardmaster told him anything to the effect that the rear end of the train was to be worked. He testified that he had no notice that anything was to be done at that end of the train beyond attaching the caboose, and that

after putting the second, third and fourth cars upon the side track and coming back to the train he looked up the track, which was straight, saw no lamp or other signal, and then proceeded with his coupling operations, with the result already mentioned. Whether it was usual, in conducting such switching operations, to have a man at the forward end of the moving cut of cars, was in dispute. Plaintiff testified that "it is the custom to have a man on the front end of a cut of cars that is being switched into other cars, who looks out for that and runs and stops the engine just before they get there, in making the coupling." Two of defendant's witnesses contradicted this; one in terms denying the custom of giving a warning as stated by plaintiff; the other declaring that "all the warning he knew of being given, or the practice, was for the men in and about the train to take care of themselves and see for his own danger when he attempts to do any work, and the witness knew of no signals given"; while another and experienced witness, called by defendant, being asked if it was customary when running in a cut of cars to have a man on the front end with a light, replied: "Well, on the yard in switching cars they come right down to the book rule. It says where cars are being shoved a man must be placed on the head car." Whether there was a man at the forward end of the cut of cars that produced the collision in question was in controversy. As to plaintiff's opportunity to gain knowledge of the alleged custom, it did not distinctly appear that he had previously worked on a manifest train. He testified that he had been employed as brakeman something more than five years, part of the time as an extra man and part of the time as a regular man; that he was an extra man when hurt; had been a regular brakeman until about three weeks before the accident, when he was "pulled off the local freight."

Plaintiff recovered a verdict for substantial damages,

and the judgment was affirmed by the Circuit Court of Appeals. 218 Fed. Rep. 23.

There are numerous assignments of error, but most of them are manifestly unfounded. The only ones requiring notice are based upon the refusal of the trial court to instruct the jury in accordance with defendant's Request B, and the modified instruction that was given in its stead. The requested instruction was, in substance: That if the jury believed from the evidence that the method adopted by defendant in making up the train on the occasion in question was the usual and ordinary method of doing this work, then plaintiff assumed all the risks incident to that method, and they should not find a verdict in his favor because of any injury received on account of said method of doing the work, even though it was the direct and proximate cause of his injury. The instruction given was, in substance: That defendant had the right to adopt reasonable rules and regulations for the conduct and method of handling its trains in its yards, and of making up trains for their departure therefrom, and that if the jury believed from the evidence that the custom prevailed in the Gladstone yard of making up the train from both ends at the same time, that is to say, by working the train engine and crew at the forward end and the yard engine and its crew at the rear end, and that such method was one that reasonably prudent and careful men would have adopted in the conduct of the business, then the plaintiff assumed the risks reasonably and usually incident to and arising from such method of making up trains, and they should not find a verdict in his favor because of any injury received solely on account of said method of making up the train, although they believed from the evidence that the method adopted was the proximate cause of the injury.

The argument for plaintiff in error is that an employee assumes the risks arising from the employer's method of

doing the work, where the dangers are open, obvious or known to the employee, even though they be due to the employer's negligence in establishing the method or system; that the customary method of shifting and coupling cars at both ends of a manifest train at the same time, without notice or warning to those working at the other end, was open, obvious, and known to plaintiff; and that he therefore assumed the risk of any injury from that source.

It appears to have been conceded by plaintiff in the Circuit Court of Appeals that the attaching and detaching of cars by working on both ends of the train at the same time, was customary at the Gladstone yard; but it does not appear to have been conceded in that court or in the trial court that plaintiff knew of this custom or had had such opportunity for knowledge as to be charged with notice of it. Nor was it conceded that the custom included the pushing in of a cut of cars without a man at their head to give warning to other workmen and to signal the engineer to slacken speed. As already shown, the evidence left these matters open to dispute.

There are several reasons why error cannot be attributed to the trial court for refusing the requested instruction B.

(a) The evidence left it in doubt what method was adopted in making up the train in question and what was the usual and ordinary method, and the request therefore failed to define what state of facts should charge plaintiff with an assumption of the risk.

(b) The request ignored the question whether plaintiff had knowledge or was chargeable with notice of the customary method. The argument in effect concedes, what is plainly inferable from the evidence, that the danger to a brakeman at work in switching at one end of a manifest train, arising from switching operations conducted by another crew at the other end, is not among the ordinary

risks of a brakeman's employment. But, if it was an unusual and extraordinary danger, plaintiff could not be held to have assumed it, in the absence of knowledge or notice on his part. To subject an employee, without warning, to unusual dangers not normally incident to the employment, is itself an act of negligence. And, as has been laid down in repeated decisions of this court, while an employee assumes the risks and dangers ordinarily incident to the employment in which he voluntarily engages, so far as these are not attributable to the negligence of the employer or of those for whose conduct the employer is responsible, the employee has a right to assume that the employer has exercised proper care with respect to providing a reasonably safe place of work (and this includes care in establishing a reasonably safe system or method of work) and is not to be treated as assuming a risk that is attributable to the employer's negligence until he becomes aware of it, or it is so plainly observable that he must be presumed to have known of it. The employee is not obliged to exercise care to discover dangers not ordinarily incident to the employment, but which result from the employer's negligence. *Tex. & Pac. Ry.* v. *Archibald*, 170 U. S. 665, 671, 672; *Choctaw, Oklahoma &c. R. R.* v. *McDade*, 191 U. S. 64, 68; *Tex. & Pac. Ry.* v. *Harvey*, 228 U. S. 319, 321; *Gila Valley Ry.* v. *Hall*, 232 U. S. 94, 101; *Seaboard Air Line* v. *Horton*, 233 U. S. 492, 504.

(c) The request required defendant to be acquitted if the usual method of doing the work was pursued, irrespective of the question of the negligence of the yard crew in carrying it out. Negligence in the doing of the work was the *gravamen* of plaintiff's complaint, in his declaration as in his evidence, and defendant was not entitled to an instruction making the pursuit of a customary system decisive of the issue, without regard to whether due care was exercised in doing the work itself. Even if plaintiff knew and assumed the risks of an inherently

dangerous method of doing the work, he did not assume the increased risk attributable not to the method but to negligence in pursuing it. Had the instruction been given in form as requested, the jury, in view of the issue and the evidence, might easily have interpreted it as meaning that if defendant's employees usually and customarily made up trains in such a manner that by a violent collision produced by negligent switching operations at the rear end of a long train a brakeman engaged in the performance of his duties at the forward end, and having no notice or warning of the rear-end switching, was in danger of serious personal injury, there was no liability. This, of course, is not the law.

Nor is the modification of the requested instruction a matter of which defendant may complain. The court evidently understood the request as meaning no more than what it said, and as not intended to embrace the hypothesis that plaintiff knew or had notice that the usual method of making up trains was that adopted on the occasion in question. In the absence of such knowledge or notice, the custom could not be made binding upon plaintiff; certainly not without a finding that it was one that a reasonably careful employer would have adopted. It was this finding that the modification called for.

Judgment affirmed.